No. 94-771-CFX
Status: GRANTED

Title: Oklahoma Tax Commission, Petitioner
v.
Chickasaw Nation

Docketed:
October 27, 1994

Court: United States Court of Appeals for the Tenth Circuit

Counsel for petitioner: Rothfeld,Charles

Counsel for respondent: Rabon,Bob

Entry	Date	Note	Proceedings and Orders
1	Sep 29 1994	D	Application (A94-227) for a stay, submitted to Justice Breyer.
2	Oct 7 1994		Response to application (A94-227) filed by Chickasaw Nation.
3	Oct 11 1994		Application (A94-227) denied by Justice Breyer.
4	Oct 27 1994	G	Petition for writ of certiorari filed.
9	Nov 29 1994		Brief of respondent Chickasaw Nation in opposition filed.
5	Nov 30 1994		DISTRIBUTED. January 6, 1995 (Page 3)
6	Nov 30 1994	X	Brief amicus curiae of Muscogee (Creek) Nation filed.
7	Nov 30 1994	X	Brief amicus curiae of Petroleum Marketers Association filed.
8	Nov 30 1994	X	Brief amicus curiae of Cherokee Nation filed.
10	Dec 6 1994	X	Reply brief of petitioner filed.
11	Jan 6 1995		Petition GRANTED. **********
12	Feb 2 1995		SET FOR ARGUMENT MONDAY, APRIL 24, 1995. (3RD CASE).
13	Feb 8 1995	G	Motion of petitioner to dispense with printing the joint appendix filed.
15	Feb 17 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Tenth Circuit.
14	Feb 21 1995		Motion of petitioner to dispense with printing the joint appendix GRANTED.
16	Feb 21 1995		Brief of petitioner Oklahoma Tax Commission filed.
17	Feb 21 1995		Brief amici curiae of Petroleum Marketers Association, et al. filed.
18	Feb 21 1995		Brief amici curiae of South Dakota, et al. filed.
19	Feb 24 1995		CIRCULATED.
20	Feb 27 1995		Record filed.
		*	Original record proceedings United States District Court for the Eastern District of Oklahoma.
21	Mar 8 1995	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
22	Mar 20 1995		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
23	Mar 27 1995	X	Brief amicus curiae of United States filed.
24	Mar 27 1995	X	Brief amicus curiae of Navajo Nation Oil and Gas Co. filed.
25	Mar 27 1995	X	Brief amicus curiae of Cherokee Nation filed.
26	Mar 27 1995	X	Brief amicus curiae of Sac and Fox Nation filed.
27	Mar 27 1995	X	Brief amici curiae of Cheyenne-Arapaho Tribes of Oklahoma,

No. 94-771-CFX

Entry	Date	Note	Proceedings and Orders
			et al. filed.
28	Mar 27 1995	X	Brief of respondent Chickasaw Nation filed.
30	Mar 27 1995	X	Brief amicus curiae of Choctaw Nation (Returned 30 for covers) filed.
29	Mar 31 1995		LODGING by respondent. Copy of Modification Contract issued to Chickasaw Nation of Oklahoma.
31	Apr 14 1995	X	Reply brief of petitioner filed.
32	Apr 18 1995	X	Supplemental brief of respondent filed.
33	Apr 24 1995		ARGUED.

Supreme Court, U.S.
FILED

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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

OKLAHOMA TAX COMMISSION,

Petitioner

v.

CHICKASAW NATION,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether principles of federal pre-emption or Indian sovereignty preclude a State from imposing a tax on motor fuel sold by an Indian tribe, when the fuel is purchased in substantial part by non-Indians or non-members of the tribe, and the fuel is used outside of Indian country on roads constructed and maintained by the State.

2. Whether the legal incidence of Oklahoma's tax on motor fuel falls upon the ultimate purchaser of the fuel.

3. Whether federal law precludes state taxation of the income of Indians who work on tribal trust lands but live outside of Indian country.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No.

OKLAHOMA TAX COMMISSION, *Petitioner*

v.

CHICKASAW NATION, *Respondent*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-31a) is reported at 31 F.3d 964. The opinion of the district court (App., *infra*, 32a-38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Relevant portions of Okla. Stat., Tit. 68, Art. 5, and of the Treaty With the Chocktaw, Sept. 27, 1830, 7 Stat. 333, are reprinted at App., *infra*, 39a-43a.

STATEMENT

The court of appeals' decision in this case imposes an extraordinary restriction on state taxing authority. The court held that imposition of a state tax on motor fuel sold by an Indian tribe is precluded by principles of federal pre-emption and Indian sovereignty — even though the fuel is sold to non-Indians, and is used outside of Indian country on roads constructed and maintained by the State. The court also held that federal law precludes the imposition of a state income tax on tribal members who are employed on tribal trust lands but who live outside of Indian country. These holdings impose a significant burden on the States, depart from the decisions of this Court, and sow considerable confusion in an already complex and difficult area of the law. Further review therefore is warranted.

1. The State of Oklahoma imposes a tax "upon the sale of each and every gallon" of gasoline and diesel fuel sold within the State. Okla. Stat., Tit. 68, §§ 502, 502.1. See also *id.*, §§ 502.2, 502.3, 502.4, 502.5, 502.6, 502.7, 516, 520, 522, 522.1. The tax statute makes the distributors of the fuel "agent[s] of the state for the collection of the excise tax" (*id.* § 506) and requires them to pay the tax due on each gallon of fuel sold to retailers or others in Oklahoma (*id.* § 505), although "[t]he retailer's wholesale price will include the motor fuel taxes which are in turn included in the retail price at the pump." App. *infra*, 35a. The tax, imposed at the rate of $.17 per gallon on gasoline and $.14 per gallon on diesel fuel, is a significant source of revenue for Oklahoma, generating approximately $320 million annually. See *id.* §§ §§ 502, 502.1, 502.2, 502.3, 502.4, 502.5, 506.2, 502.7, 520, 522, and 522.1. Over 70% of this revenue is deposited

in the State Transportation Fund for use in highway construction; most of the remainder is given to counties and municipalities for road maintenance. See *id.* §§ 504, 504.1, 518, 519, 523, 523.1.

2. Respondent ("the Tribe"), a federally recognized Indian tribe, owns and operates convenience stores on lands held in trust for it by the United States. These stores, which are open to the general public, sell motor fuel and other goods both to tribal members and to non-member customers. App., *infra*, 2a. While the State has exempted from tax fuel purchased by respondent for use in tribally owned vehicles (see *id.* at 35a), it has collected the tax on fuel obtained by respondent for resale at the Tribe's convenience stores.

Invoking principles of Indian sovereignty, respondent brought this suit against the Commission in 1991, seeking to enjoin collection of the tax "on *all* motor fuel it purchases for resale" (App., *infra*, 35a (emphasis added)) — including fuel sold to non-Indians for use on state roads lying outside of Indian country.[1] The United States District Court for the Eastern District of Oklahoma rejected respondent's claim. App., *infra*, 35a-37a. The court began by noting that "[f]ederal law does not preempt the state motor fuel tax scheme," which meant that the Tribe could prevail only by "show[ing] that the motor fuel tax infringes on the right of tribal self-government." App., *infra*, 36a. On that issue, the district court explained that this Court's decisions "seek[] an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Ibid.*

In conducting that inquiry, the court made a series of factual findings:

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[1] For the definition of Indian country, see *Oklahoma Tax Commission* v. *Sac and Fox Nation*, 113 S. Ct. 1985, 1991 (1993).

> In Oklahoma the gasoline transported onto Indian country is for resale only and is used almost exclusively off of Indian country on State jurisdiction roads. * * *
>
> Further, the Tribe does not construct or maintain roads and highways for the use of the general public in Oklahoma. The State of Oklahoma constructs and maintains 111,412.76 miles of streets, roads and highways in Oklahoma which is funded by the state tax on motor fuel. All of the road mileage maintained by the state is off Indian Country.

App., *infra*, 36a-37a.

Against this background, the court found that the tax exemption sought by respondent would serve principally to permit it "'to market an exemption from state taxation to persons who would normally do their business elsewhere.'" App., *infra*, 37a, quoting *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980). In addition, because the motor fuel subject to tax is used almost exclusively on state roads maintained by Oklahoma outside Indian country, "the gasoline tax used to maintain these roads is directed at off-reservation value where the taxpayer is receiving State services, whether the taxpayer is a tribal member or not." *Ibid.* "In this context," the court concluded, "the patrons of tribal gas stations are properly subject to the State's motor fuel taxes." *Ibid.*

The court of appeals reversed, holding that the district court erred in two respects. App., *infra*, 12a-16a. First, the court of appeals concluded that the district court should have found the legal incidence of the tax to be on the retailer and therefore, in this case, on the Tribe. The court of appeals recognized that "the statutes do not expressly declare the legal incidence of the taxes to be on the retailer" (App., *infra*, 13a), and acknowledged that "it may well be that the tax is ultimately passed on to the consumer at the pump." *Id.* at 14a. But the court nevertheless relied on the observation that

"[t]he statutes nowhere require the amount of the tax to be included in the retail price at the pump, a requirement which we could interpret as imposing the tax on the consumer." *Id.* at 13a. The court also found that certain statutory provisions — in particular, those providing that distributors receive credits for tax remittances that cannot be collected from retailers — make the distributor "no more than a transmittal agent for the taxes imposed on the retailer." *Id.* at 14a.

In this setting, the court of appeals concluded that the district court also erred in rejecting respondent's claim that the motor fuel tax was displaced by principles of Indian sovereignty. The court of appeals reasoned that

> [b]ecause they are directed toward funding traditional government activities, the taxes fall within the ambit of the sovereignty of the tribal government. * * * Where the state action conflicts with a power within the traditional scope of Indian sovereign authority, preemption is presumed in the absence of an explicit statement of congressional intent to the contrary.

App., *infra*, 15a-16a. The court of appeals therefore held that "the district court's balancing of the respective tribal and state interests at stake was not relevant to the determination of the propriety of the fuel taxes"; it directed a grant of summary judgment in the Tribe's favor. *Id.* at 16a.

3. This case also involves a claim that the State cannot impose its income tax on persons who are employed by the Tribe on tribal trust lands. See App., *infra*, 33a. The district court found that claim controlled by the Tenth Circuit's decision in *Sac and Fox Nation* v. *Oklahoma Tax Comm'n*, 967 F.2d 1425 (10th Cir. 1992), and dismissed it as moot. App., *infra*, 38a. While the appeal in this case was pending, however, this Court vacated and remanded the Tenth Circuit's decision in *Sac and Fox* (see *Oklahoma Tax Comm'n* v. *Sac and Fox Nation*, 113 S. Ct. 1985 (1993)), and the

court below accordingly addressed the merits of respondent's claim.

The court of appeals first held that the State may impose the tax on tribal employees who are not members of the Tribe (App., *infra*, 21a-22a), but that the tax may not be applied to employees who are members of the Tribe and who live on the formal reservation or in Indian country. *Id.* at 23a-24a. In the portion of the holding at issue here, the court then held that the state may *not* tax the income of tribal members who are employed by the Tribe but who live *outside* of Indian country. Noting that this Court in *Sac and Fox* left open the question whether such persons are presumptively outside the scope of the State's taxing jurisdiction (*id.* at 25a, citing 113 S. Ct. at 1992), the court of appeals concluded that such a presumption should not apply. See *id.* at 26a.

The court nevertheless held, however, that state taxation of tribal members is expressly barred by the United States' treaty with the Chickasaw Nation. That treaty provides, in relevant part:

> The Government and the people of the United States are hereby obliged to *secure to the said [Chickasaw] Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have [the] right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants*; and that no part of the land granted them shall ever be embraced in any territory or State; but the U.S. shall forever secure said [Chickasaw] Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.

Treaty of Sept. 27, 1830, 7 Stat. 333 (emphasis added).[2] The court concluded that "[t]he crucial question in determining the validity of the income tax under the relevant treaty language is * * * whether the law is one imposed on the Chickasaw Nation or its descendants. Residency is simply not relevant to this determination." App., *infra*, 30a. The court therefore held that Oklahoma's income tax may not be imposed "on the wages of Chickasaw members, earned on the reservation or in Indian country, regardless of the residence of those members." *Ibid.*[3]

REASONS FOR GRANTING THE PETITION

This case involves a "vexing" and "intricate" question (*Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 138 (1980)) that "has occupied the Court many times in the recent past" (*Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, 458 U.S. 832, 847 (1982) (Rehnquist, J., dissenting)): how to "'reconcile the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations.'" *Dept. of Taxation and Finance* v.

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[2] The treaty actually was concluded with the Choctaw, but it is undisputed that a subsequent treaty made the Chickasaw the beneficiaries of the Choctaw agreement. See App., *infra*, 29a-30a & n.10. The United States reaffirmed the treaty in 1866, see Treaty with the Choctaw and Chickasaw of April 28, 1866, 14 Stat. 769, Art. 10, and again in 1871. 25 U.S.C. § 71.

[3] The decision below also addressed challenges to two other Oklahoma taxes. The court of appeals upheld the validity of the State's tax on 3.2% beer sold in tribal stores. App., *infra*, 4a-12a. In addition, respondent contended that the State was improperly requiring the collection of sales tax on retail sales made to the Tribe; the State responded that it treated such sales as exempt from tax. Both the Tribe and the court accepted Oklahoma's statement of its policy as valid. *Id.* at 16a-19a.

Milhelm Attea & Bros., 114 S. Ct. 2028, 2035 (1994), quoting *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 165 (1973). The court of appeals' answer to that question should not stand. The approach taken by the court below significantly, and improperly, diminishes the power of the States to raise revenue; it departs from this Court's precedents in the placement of the legal incidence of the challenged tax; and it threatens to cause enormous confusion about state authority in an area of great concern both to the States and to Indian tribes. Because only this Court can police the complex and competing sovereign interests at work here, further review of the decision below is in order.

I. OKLAHOMA'S FUEL TAX MAY BE APPLIED TO SALES BY THE TRIBE

A. Fuel That Is Sold By A Tribe To Non-Members And That Is Used On State Roads Is Subject To Tax

At the outset, the nature of the fuel tax that was invalidated by the court below bears emphasis. The economic burden of the tax plainly falls upon the ultimate consumer of fuel, as the court of appeals itself understood; the court acknowledged that "it may well be that the tax is ultimately passed on to the consumer at the pump." App., *infra*, 14a. The purchasers bearing that burden are, in substantial part, *non-Indians* or *non-members* of the Tribe. The motor fuel subject to tax is, in large measure, used *outside* of Indian country. And perhaps most significant, the tax revenues are used to defray the costs (of road construction and maintenance) imposed upon the *State* — and *only* upon the State — by the use of that fuel.

In nevertheless invalidating the fuel tax, the court of appeals found a single consideration dispositive. It concluded that the legal incidence of the tax falls upon the retailer (and therefore, in this case, upon the Tribe), and proceeded to apply a *conclusive* presumption against the validity of such a

tax. We explain below that the court's placement of the levy's legal incidence was wrong. But even granting for the moment that the legal incidence of the tax does fall upon the Tribe, the decision below plainly departed from this Court's precedents: it elevated form over substance, wholly disregarded the State's weighty interest in taxing the recipients of state services, and imposed a dramatic restriction on state taxing authority. It should be set aside by this Court.

1. While the court of appeals resolved this case through application of a dispositive presumption, as a general matter "there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980). "Instead, [the Court] ha[s] applied a flexible pre-emption analysis sensitive to the particular facts and legislation involved. Each case 'requires a particularized examination of the relevant state, federal, and tribal interests.'" *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 176 (1989) (citation omitted). As the Court explained just last Term,

> Resolution of conflicts of this kind does not depend on "rigid rule[s]" nor on "mechanical or absolute conceptions of state or tribal sovereignty," but instead on a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."

Milhelm Attea, 114 S. Ct. at 2035 (citation omitted).

In conducting this inquiry, "'[c]ongressional authority and the "semi-independent position" of Indian tribes * * * [are] two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members.'" *Rice* v. *Rehner*, 463 U.S. 713, 718 (1983) (citations omitted). Thus, "state authority may be pre-empted by federal law, or it may interfere with the tribe's ability to

exercise its sovereign functions." *Ramah Navajo*, 458 U.S. at 837.[4] On the tribe's side of this equation, the Court considers whether application of state law on tribal lands "'would interfere with reservation self-government.'" *Rice*, 463 U.S. at 718, quoting *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973). At the same time, the Court has "recognized that 'any applicable regulatory interest of the State must be given weight.'" *Id.* at 719.

The Court has followed this approach in assessing the validity of at least some aspects of state taxation. It is clear, for example, that the principle of Indian sovereignty does not preclude imposition of state taxes that fall on an Indian tribe for "tribal activities conducted outside the reservation." *Mescalero Apache*, 411 U.S. at 148. See *Colville*, 447 U.S. at 163-164. Even as to activities taking place on reservation or trust lands, it also is plain that "sales to persons other than reservation Indians * * * are legitimately subject to state taxation." *Milhelm Attea*, 114 S. Ct. at 2031. And so far as such transactions are concerned, the Court has held repeatedly that States may exercise their authority directly against tribes

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[4] "The trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. * * * The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power." *McClanahan*, 411 U.S. at 172. See *Colville*, 447 U.S. at 178-179 (opinion of Rehnquist, J.). This distinction may not make much of a practical difference, however. Principles of Indian sovereignty "provide[] a backdrop against which the applicable treaties and federal statutes must be read" (*McClanahan*, 411 U.S. at 172); those principles accordingly give content to the unique preemption doctrine applied to state laws affecting Indians. See generally *Rice* v. *Rehner*, 463 U.S. 713, 718-719 (1983); *White Mountain Apache*, 448 U.S. at 143. Traditions of Indian sovereignty and the practicalities of Indian self-government therefore bear on the existence of preemption.

by requiring them to shoulder tax collection obligations on the States' behalf; States may "impose tax collection and bookkeeping burdens on reservation retailers who are themselves enrolled tribal members, including stores operated by the tribes themselves." *Id.* at 2036. See *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512, 513 (1991); *California State Board of Equalization* v. *Chemehuevi Indian Tribe*, 474 U.S. 9, 12 (1985) (per curiam); *Colville*, 447 U.S. at 151, 159; *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 481-483 (1976).

2. a. To be sure, the Court has taken a more rigid approach where the full weight of state taxation has fallen directly upon the on-reservation activities of Indian tribes. The Court thus has characterized *McClanahan*, the seminal modern decision in the area, as holding that

> even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. * * * Even so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing *Indian reservation lands* or *Indian income* from activities carried on within the boundaries of the reservation.

Mescalero Apache, 411 U.S. at 148 (emphasis added). See *Moe*, 425 U.S. at 475-476.

The Court has applied this principle repeatedly to invalidate state taxes whose legal *and* economic incidence necessarily fell on tribal activities taking place in Indian country — for example, a state income tax on "a reservation Indian whose entire income derives from reservation sources" (*McClanahan*, 411 U.S. at 165), or a tax on a tribe's royalty interests in reservation oil and gas leases (*Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 761 (1985)), or a tax on the sale of cigarettes on the reservation "to tribal

members for their own consumption." *Milhelm Attea*, 114 S. Ct. at 2031.[5] These decisions followed from the notion of Indian sovereignty that underlies the Court's analysis in this area, for all of the challenged taxes infringed to some degree "'on the right of reservation Indians to make their own laws and be ruled by them.'" *White Mountain Apache*, 448 U.S. at 142, quoting *Williams* v. *Lee*, 358 U.S. 217, 220 (1959). See *McClanahan*, 411 U.S. at 172. After all, a state tax on reservation sales *by* the Tribe *to* its members could "interfere with internal governance" (*Duro* v. *Reina*, 495 U.S. 676, 686 (1990)) by regulating the relationship between the tribal entity and individual members of the Tribe; direct taxation of a tribe's income could impose potentially ruinous liability and threaten to displace the mechanisms of tribal self-government.

But the rule against direct taxation of a tribe's on-reservation activities has never been stated in absolute terms. It is, instead, a "*presumption* against jurisdiction" (*Sac and Fox*, 113 S. Ct. at 1990 (emphasis added)) under which "Indian tribes and individuals *generally* are exempt from state taxation within their own territory." *Blackfeet Tribe*, 471 U.S. at 764 (emphasis added). See *White Mountain Apache*, 448 U.S. at 144 ("state law is *generally* inapplicable") (emphasis added); *Duro*, 495 U.S. at 686 ("[w]e have held that States may not impose *certain* taxes on transactions of tribal members on the reservation") (emphasis added). And *McClanahan*, the fountainhead of the Court's doctrine, stated its rule as applicable only to taxes on Indian *lands* or *income*.

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[5] See also *Sac and Fox*, 113 S. Ct. at 1990-1993 (income tax, and excise tax and registration fees on vehicles, imposed on Indians in Indian country); *Colville*, 447 U.S. at 162-164 (taxes on motor vehicles owned by tribes or their members); *Moe*, 425 U.S. at 480-481 (personal property tax on reservation property, license fee on Indian retailers doing business on the reservation, and tax on on-reservation sales of cigarettes by Indians to Indians).

b. So far as we are aware, this rule has *never* been applied to invalidate a state tax in the circumstances here: where the economic burden of the tax falls (as the court below acknowledged might well be the case) on purchasers who are *non-Indians* or *non-members* of the Tribe; where the State undeniably could impose the tax directly on those purchasers — and could, under *Milhelm Attea*, *Potawatomi*, *Colville*, and *Moe*, require the Tribe to collect and remit the tax; and where use of the product sold generates costs that are imposed entirely upon the *State*. Indeed, the Court has declared the rule against state taxation inapplicable in just such a situation, emphasizing that its holdings invalidating state levies on Indian income did not address claims "that the State could not tax that portion of the receipts attributable to on-reservation sales to non-Indians." *Moe*, 425 U.S. at 482.[6] See also *Colville*, 447 U.S. at 178 (opinion of Rehnquist, J.) ("[h]istorically this Court has found Indians to be exempt from taxes on Indian ownership and activity confined to the reservation *and not involving non-Indians*") (emphasis added).[7]

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[6] The Court in *Moe* was addressing *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685 (1965), where the Court invalidated a state gross proceeds or income tax imposed on an on-reservation Indian trader. The Court noted that the "challenge to these [taxes] is limited to the State's attempt to apply them to gross income from sales made on the reservation to reservation Indians." *Id.* at 686 n.1. That was so even though the legal incidence of the tax on sales to *non-Indians* plainly fell on the Indian trader. The tax immunity of licensed Indian traders is generally equivalent to that of Indians themselves. See *Milhelm Attea*, 114 S. Ct. at 2036.

[7] In *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987), the Court observed in a footnote that "[i]n the special area of state taxation on Indian tribes and tribal members, we have adopted a *per se* rule. * * * Accordingly, it is unnecessary to rebalance these [state and tribal] interests in every

The reason is apparent. Requiring a tribe to remit a tax on sales to non-members, and that will be used to meet costs imposed on the State by use of the goods sold, in no sense imposes a "burden which frustrates tribal self-government." *Moe*, 425 U.S. at 483. To the contrary, it is difficult to see how such a tax has any bearing whatsoever on the tribes' ability "to control their own internal relations, and to preserve their own unique customs and social order." *Duro*, 495 U.S. at 685-686. The tax, moreover, does not fall upon any value generated by Indians on Indian land:

> It is painfully apparent that the value marketed by the [retailers] to persons coming from outside is not generated on the reservation by activities in which the Tribes have a significant interest. * * * What the [retailers] offer these customers, and what is not available elsewhere, is solely an exemption from state taxation.

Colville, 447 U.S. at 155. And the Court has repeatedly "rejected the proposition that 'principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.'" *Milhelm Attea*, 114 S. Ct. at 2035, quoting *Colville*, 447 U.S. at 155.[8]

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case." But *Cabazon Band*, which was not a case involving state taxation and which relied for its observation on *Blackfeet Tribe* and *McClanahan*, cannot be read as approving preemption of state law in the circumstances of this case.

[8] After the decision below, the Tribe imposed its own tax on gasoline and diesel fuel that is roughly equivalent to that imposed by the State. See Tribal Law 11-011 (Aug. 11, 1994). That the Tribe is not now marketing its tax exemption by undercutting other retailers, however, does not mean that it — or Oklahoma's many other tribes — will not do so in the future. In any event, even if

At the same time, the State has a compelling interest in imposing the challenged tax, for the sale and use of motor fuel "has a significant impact beyond the limits of" Indian country. *Rice*, 463 U.S. at 724. It is the existence of state-funded public highways that makes possible the Tribe's sale of fuel, while the use of that fuel requires considerable expenditures for the maintenance and construction of state roads. "This particular 'spillover' effect is qualitatively different from any 'spillover' effect of income taxes or taxes on cigarettes. 'A State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention.'" *Ibid.*, quoting *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 336 (1983). And here — in contrast to other cases in which state

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the Tribe does not lower its prices, the tax exemption nevertheless is valuable only because it allows for imposition of a tribal tax that otherwise would not be feasible. See *Colville*, 447 U.S. at 154-159. Yet the State

> does not infringe the right of reservation Indians "to make their own laws and be ruled by them," *Williams* v. *Lee*, 358 U.S. 217, 220 (1959), merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving. The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other. * * * While the Tribes do have an interest in raising revenue for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

Id. at 156-157.

taxes have been invalidated (see *White Mountain Apache*, 448 U.S. at 150) — the Tribe does *not* construct or maintain highways for the use of the general public; that burden falls entirely on the State.

As the district court found,

> In Oklahoma the gasoline transported onto Indian country is for resale only and is used almost exclusively off of Indian country on State jurisdiction roads. * * *
>
> Further, the Tribe does not construct or maintain roads and highways for the use of the general public in Oklahoma. The State of Oklahoma constructs and maintains 111,412.76 miles of streets, roads and highways in Oklahoma which is funded by the state tax on motor fuel. All of the road mileage maintained by the state is off Indian Country. Therefore, the gasoline tax used to maintain these roads is directed at off-reservation value where the taxpayer is receiving State services, whether the taxpayer is a tribal member or not.

App., *infra*, 36a-37a.

The court of appeals accordingly erred in holding that "the district court's balancing of the respective tribal and state interests at stake was not relevant to the determination of the propriety of the fuel taxes." App., *infra*, 16a. Instead, this is a proper case for application of a different principle:

> "This Court has repeatedly said that tax exemptions are not granted by implication. ... It has applied that rule to taxing acts affecting Indians as to all others. ... If Congress intends to prevent the State of Oklahoma from levying a general non-discriminatory * * * tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences."

Mescalero Apache, 411 U.S. at 156, quoting *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 606-607 (1943).[9]

3. In these circumstances, the holding below, which invalidates the fuel tax simply because the legal incidence is said to fall on the Tribe, rests upon the most sterile formalism. It is indisputable, after all, that the State could accomplish precisely the same thing by declaring the tax to fall on the consumer and directing the Tribe to collect and remit the levy. In the court of appeals' view, then, "the only difference between" a constitutional tax and one that is invalid is "their names." *Sac and Fox*, 113 S. Ct. at 1993.

If this defect may be cured simply by declaring in the text of the tax statute that the legal incidence falls on the consumer, as the court below appeared to suggest (App. *infra*, 13a), its decision "has no relationship to economic realities. Rather it stands only as a trap for the unwary draftsman." *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). And as this case illustrates, the trap would be a significant one. The Oklahoma statute does not, after all, "expressly declare the legal incidence of the taxes to be on the retailer" (App., *infra*, 13a), and the State consistently has understood the incidence of the tax to fall on the consumer. That the court of appeals nevertheless found the incidence of the tax to rest on the Tribe — and that the Tribe is entitled to a tax exemption as a result — is sure to foment litigation, as other tribes across the country attempt to convert statutory ambiguities into tax immunities. The possibility that States could withdraw those exemptions after the fact by

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[9] While it thus is clear that the tax may be imposed on sales of fuel to non-members of the Tribe, it is our view that the tax could be imposed on sales made to members of the Tribe as well. The fuel they purchase will be used on state roads outside of Indian country; as the district court explained, all users of fuel — whether or not tribal members — therefore will be obtaining off-reservation services from the State.

changing the statutory language is not a complete solution to this problem, because Indian sovereign immunity would prevent recovery by the States of forgone tax revenues. See *Potawatomi*, 498 U.S. at 509-511.

If, on the other hand, the immunity conferred by the court of appeals cannot be eliminated with the stroke of a pen, the ultimate constitutionality of a State's tax regime would turn on "mere nomenclature." *Colville*, 447 U.S. at 163-164. This is so even though "[t]here is no economic consequence that follows necessarily from the use of * * * particular words, * * * and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect." *Complete Auto*, 430 U.S. at 288. Such an approach could impose crippling burdens on state governments.

In either case, then, review plainly is in order. The decision below departs from this Court's clear holdings: "[t]here is of course no question that the Court has discarded the controlling significance of the label a State attaches to its taxes. A tax instead must be judged by its 'practical operation.'" *Colville*, 447 U.S. at 188 (opinion of Rehnquist, J.), quoting *Detroit* v. *Murray Corp.*, 355 U.S. 489 (1958).[10] And the court of appeals' approach entirely

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[10] The Court has found the legal incidence of the tax to be controlling in one circumstance: when a state levy falls directly on the United States. That is because the Federal Government's immunity from state taxation "has taken on essentially symbolic importance, as the visible 'consequence of that [federal] supremacy which the constitution has declared.'" *United States* v. *New Mexico*, 455 U.S. 720, 735 (1982), quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819). That rationale has no application to the relationship between States and Indian tribes, however. The United States, as the "suprem[e]" sovereign, is wholly immune from state regulation and taxation. In contrast, the rules of Indian sovereignty are adjusted to accommodate state interests. See pages 9-11, *supra*.

divorces Indian tax immunity from its rationale, leaving it as an engine for the destruction of the state fisc. This is a matter of the greatest significance to the States, for "[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments." *Dows* v. *City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871).

4. As this discussion suggests, the issue here is of considerable practical importance. In the most immediate terms, the motor fuel tax is a very significant source of revenue for Oklahoma, producing more than $300 million annually. Under the court of appeals' rule, the taxes forgone on sales by respondent — and by Oklahoma's 40 other tribes — would be substantial. But that will not be the extent of the State's loss; "marketing" of the tax exemption by the tribes will take business (and therefore taxable sales) from non-Indian retailers, further diminishing tax revenue. The amounts involved surely will be significant. Cf. *Milhelm Attea*, 114 S. Ct. at 2031 (purchases of untaxed cigarettes by non-Indians cost State $65 million in annual revenue).[11]

More broadly, the decision below threatens state taxing authority and creates great uncertainty in an area of enormous day-to-day concern to the States. That decision raises doubts about the validity of any tax that does not in terms declare its legal incidence. As we suggest above, it is sure to prompt litigation. Its express disregard of the functional concerns that underlie controlling concepts of Indian sovereignty and preemption — and its holding that the "state interests at stake" are simply irrelevant (App., *infra*, 16a) — departs

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[11] This is a particular problem in Oklahoma because it is home to many tribes; in addition, the history of Oklahoma allotments means that Indian country is scattered helter skelter across the State, so that purchasers of fuel always are likely to be near an Indian retailer. See generally *Sac and Fox*, 113 S. Ct. at 1987, 1993; *Woodward* v. *De Graffenried*, 238 U.S. 284 (1915).

from the principles announced by this Court, sowing confusion in what already is a vexing area. Further review therefore is in order.

B. The Legal Incidence Of The Fuel Tax Falls Upon The Consumer

The decision below regarding the fuel tax should be set aside for another reason as well: the foundation for its holding — the conclusion that the legal incidence of the tax falls on the retailer — is incorrect. While that determination involves a matter of state law, the court of appeals' analysis departs from what this Court has held to be the proper approach in determining the legal incidence of state taxation. Because the decision below also disrupts administration of an essential component of the State's system of taxation, further review is warranted.

1. The court of appeals' holding that the legal incidence of the tax falls on the retailer turned largely on its analysis of a statutory provision indicating that taxes are remitted to the State by distributors "'on behalf of a licensed retailer,'" and that a distributor that is unable to collect the tax from the retailer may deduct that amount from its future tax remittances. App., *infra*, 13a-14a, quoting Okla. Stat., Tit. 68, § 505C. But that provision suggests only that the legal incidence of the tax falls somewhere down the distribution chain from the distributor; it says nothing about whether that incidence comes to rest with the retailer rather than the consumer. And other statutory provisions make it clear that it *is* the consumer that bears the legal incidence of the tax. Thus, the basic definitional elements of the motor fuel tax code — which were wholly disregarded by the court below — refer to the requirement that "a distributor, dealer, or *retailer* * * * *collect* taxes levied by this act" (Okla. Stat., Tit. 68, § 501C (emphasis added)) — indicating that the obligation of both the distributor *and the retailer* is that of collecting the tax from someone further down the distribution chain.

This conclusion is confirmed by the exemption provisions of the tax code. Exemptions are granted to the *consumer* of fuel, and are passed *up* the distribution chain to the retailer and then to the distributor. This regime, which in certain circumstances releases the ultimate purchaser from its obligation to pay the fuel tax, must be understood as placing the incidence of the tax on that purchaser.

Thus, tax is not due on diesel fuel "used exclusively for purposes other than to operate motor vehicles on the public highways of this state" (Okla. Stat., Tit. 68, § 509.2A (1994)), and any person who places diesel fuel purchased under such an exemption "into the fuel tank of a motor vehicle for use in operating the motor vehicle on the public highways *shall be liable for the taxes.*" *Id*, § 509.2C (emphasis added). Fuel purchased by a county, city, or town for use in its vehicles is exempt from tax "provided that if the diesel fuel is placed directly into the fuel supply tank or tanks of the motor vehicle by the supplier, certification must be made on the invoice and all such sales must be reported by the supplier on forms furnished by the Oklahoma Tax Commission." *Id.*, § 509.2(F). Similar exemptions are provided for fuel sold for use in passenger buses or coaches, by public school vehicles, by FFA or 4-H club trucks, or by volunteer fire departments. *Id.*, §§ 509.2E, 527. And "[e]very person actually engaged in farming in Oklahoma or in a state which borders the State of Oklahoma and buying motor fuel to be used for farm tractors or stationary engines * * * and used exclusively for agricultural purposes * * * may purchase such motor fuel *without paying the tax.*" *Id.* § 509(b) (emphasis added).[12] That these provisions relieve

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[12] The court of appeals itself cited this provision for the proposition "that the tax is not imposed on the distributor." App., *infra*, 14a. We agree that the exemption does indeed stand for that proposition — and for the further proposition that the tax *is* imposed on the consumer.

the *consumer* of the burden of "paying the tax" makes clear that the consumer ordinarily bears that burden, and thus the legal incidence of the levy.

The court of appeals itself evidently acknowledged that its analysis of the statutory language was far from dispositive, premising its conclusion on the observation that the tax "statutes nowhere require the amount of the tax to be included in the retail price at the pump, a requirement which we could interpret as imposing the tax on the consumer." App., *infra*, 13a. But a similar approach, which gave dispositive significance to the absence of "'any ... *explicit* pass-through' language," already has been rejected by this Court. *Chemehuevi*, 474 U.S. at 10, quoting 757 F.2d 1047, 1056 (9th Cir. 1985) (emphasis added by the Court). In *Chemehuevi*, the Court held:

> None of our cases has suggested that an express statement that the tax be passed on to the ultimate purchaser is necessary before a State may require a tribe to collect * * * taxes from non-Indian purchasers and remit the amounts of such tax to the State. Nor do our cases suggest that the only test for whether the legal incidence of such a tax falls on purchasers is whether the taxing statute contains an express "pass on and collect" provision.

474 U.S. at 11. Instead, a court is to apply "nothing more than a fair interpretation of the taxing statute as written and applied." *Ibid.*[13] The Tenth Circuit's analysis of the motor fuel tax is not such a fair reading of the statute.

We recognize, of course, that this Court often is reluctant to review determinations made by courts of appeals regarding

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[13] The court below recognized this holding in connection with its analysis of *another* tax — Oklahoma's levy on 3.2% beer. See App., *infra*, 9a.

the meaning or application of state law. But in the setting presented by this case, the Court has been vigilant in policing decisions that will disrupt the delicate and complex adjustments of sovereign power between States, Indian tribes, and the United States. That is particularly so when it is the validity of an essential state law that hangs in the balance. The Court in *Chemehuevi* thus set aside the judgment of a court of appeals in a case very similar to this one — and, indeed, found it appropriate to do so summarily. Moreover, as we have suggested, the approach to the legal incidence issue taken by the court below will encourage litigants to attempt to convert arguable ambiguities in state tax statutes into tax immunities. In these circumstances, this Court should set aside the decision below.

II. THE TREATY WITH THE CHICKASAW NATION DOES NOT PRECLUDE IMPOSITION OF OKLAHOMA'S INCOME TAX ON TRIBAL MEMBERS WHO LIVE OUTSIDE INDIAN COUNTRY

The challenge to the second tax at issue in this case concerns a question the Court left open in *Sac and Fox*: whether Oklahoma may impose its income tax on enrolled members of an Indian tribe who earn income on Indian trust lands but do not live either on the formal reservation or within the boundaries of Indian country. The court below, construing the treaty between the United States and the Chickasaw Nation, held the tax invalid. Because this decision is plainly wrong, bars the State from taxing a group of residents to whom it provides substantial services, and is based on an interpretation of language that is found in treaties with Indian tribes across the Nation, further review by this Court is warranted.

1. In *Sac and Fox*, this Court was faced with the question whether Indians living in Indian country (but not on the formal reservation) may be subjected to state income tax

for income earned on Indian trust lands. Although the Tenth Circuit had held that the presumption against state jurisdiction to tax arises whenever a tribal member earns income on trust lands, this Court rejected any approach that fails to take account of residence: "The residence of a tribal member is a significant component of the *McClanahan* presumption against state tax jurisdiction." 113 S. Ct. at 1991.

The Court proceeded to hold that tribal members who live in Indian country, like members who live on the reservation, are presumptively outside the state's taxing jurisdiction. 113 S. Ct. at 1991, 1993. The decision was based on the view that the tradition of tribal sovereignty — which undergirds the *McClanahan* presumption against state taxation of the income of Indians who live and work on the reservation — extends beyond the formal boundaries of the reservation to the "informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States," that comprise Indian country. *Ibid.*, citing 18 U.S.C. § 1151. But the Court did not reach the question whether pre-emption or sovereignty principles preclude the State from taxing "income earned from work performed by the Tribe itself when the employee does not reside in Indian country." 113 S. Ct. at 1992.

In this case, the court below purported to read *Sac and Fox* as merely extending the *presumption* against state tax jurisdiction to tribal members living in Indian country. App., *infra*, 24a-25a. The court went on to declare that no presumption of invalidity applies to state income taxes on Indians living outside Indian country, but that a state nevertheless may be prohibited from imposing such taxes if "the tribe [can] show that the tax is barred by one of the two independent barriers to the exercise of state jurisdiction over Indians, *i.e.* interference with reservation self-government or impairment of rights granted or reserved by federal law." App., *infra*, 26a-27a. While petitioner has no quarrel with this statement in the abstract, the court's construction of the

treaty with the Chickasaw — which it held to create such an independent bar to taxation — is insupportable.

2. The court below relied on Article IV of the treaty, which provides:

> The Government and the people of the United States are hereby obliged to *secure to the said [Chickasaw] Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have [the] right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants*; and that no part of the land granted them shall ever be embraced in any territory or State; but the U.S. shall forever secure said [Chickasaw] Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.

Treaty of Sept. 27, 1830, 7 Stat. 333. The court focused in particular on the language providing that "no Territory or State shall ever have [the] right to pass laws for the government of the [Chickasaw] Nation," and held that "[t]he crucial question in determining the validity" of Oklahoma's tax is simply "whether the law is one imposed on the Chickasaw Nation or its descendants." App. *infra*, 30a. Under this analysis, "[r]esidency is simply not relevant." *Ibid.* All that matters is whether the law — although facially neutral as between Indians and non-Indians — is being applied to members of the Tribe.

In our view, this approach does violence to the plain terms of the treaty, which precludes the State from "pass[ing] laws for the *government* of the [Chickasaw Nation]" (emphasis added). In light of the *McClanahan* presumption,

this language may reasonably be read as barring state laws that regulate the affairs of tribal members, or that displace the mechanisms of tribal government, in Indian country. But it cannot fairly be stretched to proscribe a non-discriminatory state income tax imposed on persons living outside of Indian country, who receive from the State both a myriad of particular services and "[t]he intangible value of citizenship in an organized society." *Cotton Petroleum*, 490 U.S. at 189. One would not, after all, characterize a state income tax imposed on a federal employee who lives within the State's jurisdiction as a law passed "for the government of the United States."

That the holding below went too far is confirmed by the treaty language preceding that relied upon by the court of appeals. Read in context, the treaty provides that the "United States are hereby obliged to secure to the said [Chickasaw] Nation of Red People the jurisdiction and government of all persons and property *that may be within their limits west, so that* no Territory or State shall ever have the right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants" (emphasis added). This provides expressly that the agreement confers rights to the Tribe "within their limits" (what we would now call the reservation, trust land, or Indian country); the conferral of these rights "so that" state laws may not be passed for the Tribe makes clear that the treaty has effect only within Indian country.

It may be added that the tax here is not imposed upon the payment of funds *by* the tribal government in Indian country; it falls, instead, upon individual members of the Tribe who reside outside of Indian country. See *United States* v. *County of Fresno*, 429 U.S. 452, 461 n.9 (1977) ("The theory * * * that a tax on income is legally or economically a tax on its source, is no longer tenable") (citation omitted). By declaring that the residence of that tribal member "is simply not relevant" (App., *infra*, 30a), the court of appeals

therefore necessarily has held that tax immunity is an entitlement conferred upon individual Chickasaws. While the court purported not to resolve the question (see *id.* at 30a n.11), this rule would seem to preclude the imposition of Oklahoma's income tax on all Chickasaw Indians who live outside Indian country, not just those who derive their income from work on the reservation. Indeed, taken to the limits of its logic, the court's analysis would preclude the imposition of *any* state law on members of the Tribe — including all the other laws of Oklahoma and the laws of other states when Chickasaw Indians journey beyond the borders of Oklahoma. The parties to this treaty surely cannot have intended to provide Chickasaw Indians with a blanket exemption from all state law. But if that is not what the treaty means, the holding of the court below is insupportable.

Moreover, that holding cannot be reconciled with the usual rule that Indians are "subject to nondiscriminatory state law otherwise applicable to all citizens of the State" when they travel beyond the reservation boundaries. *Mescalero Apache*, 411 U.S. at 148-149. While that presumption may be overcome by "express federal law" (*ibid.*), the treaty language relied upon here hardly carries the necessary clarity. In fact, this Court has *never* found federal law sufficient to overcome the rule of *Mescalero Apache*. That is not surprising, for the interest of Indians in remaining "free from state jurisdiction and control" (*McClanahan*, 411 U.S. at 168) is most significant when "on-reservation conduct involving only Indians is at issue." *White Mountain Apache*, 448 U.S. at 144. See *Potawatomi*, 498 U.S. at 511.[14]

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[14] The court of appeals evidently found it significant that on-reservation Indian immunity from state regulation is stated more explicitly in the treaty with the Chickasaw than in the treaties addressed in *McClanahan* and *Sac and Fox*. See App., *infra*, 27a-28a. That observation, however, hardly supports the court's conclusion. The tax at issue in *McClanahan* was invalidated

3. The holding below, which grants tax immunity to a class of Oklahoma residents, is important in its own right. More broadly, it has national significance because language either identical to, or to the same effect as, that of the Chickasaw treaty recurs in treaties with tribes across the county. The 1832 treaty with the Creek, for example, provides that "[t]he Creek country west of the Mississippi shall be solemnly guarantied to the Creek Indians, nor shall any State or Territory ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves * * * ." Treaty of March 24, 1832, 7 Stat. 366, Art. XIV.[15] The 1856 treaty with the Creek and Seminole provides that "[t]he United States do hereby, solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians * * * ."[16] Many other treaties are written in similar terms, providing, for example, that Indian lands will never be within a State or Territory, "nor subject to the laws thereof." Treaty with the Seneca of July 20, 1831, 7 Stat. 351, Art. XI; Treaty with the Shawnee of Aug. 1, 1831, 7 Stat. 355, Art. X; Treaty with the Ottawa of Aug. 30, 1831, 7 Stat. 359, Art. IX.

The Tenth Circuit's expansive reading of the language in the treaty with the Chickasaw therefore provides fertile ground for challenges to state taxation. And because the

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because it fell upon a *reservation* Indian and therefore was (needless to say) subject to the *McClanahan* presumption; the Court *left open* whether the tax at issue in *Sac and Fox* could be applied to Indians living outside of Indian country.

[15] The obligations of this treaty were reaffirmed in 1866. See Treaty with the Creeks of June 14, 1866, 14 Stat. 785, Art. 12.

[16] The United States' treaty obligations to the Seminole also were reaffirmed in 1866. See Treaty with the Seminole of March 21, 1866, 14 Stat. 755, Art. 9.

court's decision cannot logically be limited to Indians who derive their income from work performed within Indian country, the holding below provides a basis for precluding the imposition of state income (or other) taxes on *any* member of these tribes that lives outside Indian country, regardless of where the tribal member works. While the court below thus in terms declined to apply the *McClanahan* presumption to Indians living outside of Indian country, the effect of its decision was to confer a general tax immunity upon Indians. That decision should be set aside by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1994

APPENDIX

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHICKASAW NATION,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	
	)	
STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION, ROBERT E. ANDERSON, CHAIRMAN OF THE TAX COMMISSION, ROBERT L. WADLEY, VICE-CHAIRMAN OF THE TAX COMMISSION, AND DON KILPATRICK, SECRETARY OF THE TAX COMMISSION,	)	No. 92-7117
	)	
Defendants-Appellees.	)	

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA

(D.C. No. CV-91-310-NJ)

Bob Rabon of Rabon, Wolf & Rabon, Hugo, Oklahoma, for Plaintiff-Appellant.

David Hudson, General Counsel (with David Allen Miley, Assistant General Counsel, on the brief), Oklahoma Tax Commission, Oklahoma City, Oklahoma, for Defendants-Appellees.

Before ANDERSON, McKAY, and EBEL, Circuit Judges.

McKAY, Circuit Judge.

Appellant Chickasaw Nation ("Tribe" or "Chickasaw"), a federally recognized Indian tribe, challenged the State of Oklahoma's authority to impose certain taxes on sales, income, motor fuel and 3.2% beer to transactions occurring in Chickasaw Indian country. The case was submitted to the district court upon stipulated facts on cross motions for summary judgment. The Chickasaw appeal from the district court's grant of summary judgment on each of the issues in favor of the State of Oklahoma and from that court's denial of the Chickasaw's cross-motion for summary judgment.

I. FACTS

In submitting the case to the district court for rulings on the cross-motions for summary judgment, the parties stipulated, *inter alia*, that

> B. plaintiff [the Tribe] owns and operates retail sales outlets on lands held in trust for it by the United States on which it sells tobacco products, motor fuel, beer and other goods. It does not collect sales taxes on its sales to tribal or non-tribal members but is required to pay sales taxes on motor fuel products and beer when it purchases them from its wholesale vendors at said retail locations. Defendants [the State] impose sales taxes on retail purchases of goods made by plaintiff where defendants contend such goods are used for "proprietary" as opposed to "governmental" purposes and when defendant contends the goods are purchased for resale to non-tribal members.
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> C. plaintiff has approximately 275 tribal member and non-tribal member employees who earn their wages on

> tribal trust lands. Defendants are collecting state income taxes on the earnings of said employees.

(Amended Pre-Trial Order at 2-3, Appellant's App. Doc. 11.)

We review the grant or denial of summary judgment *de novo*, applying the same legal standard used by the district court. *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). We view the record in the light most favorable to the party opposing the grant of summary judgment, here, the Tribe, to determine whether there is any genuine issue of material fact remaining for trial. *Russillo v. Scarborough*, 935 F.2d 1167, 1170 (10th Cir. 1991); *Deepwater Invs., Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir. 1991).

In their Amended Joint pretrial Order, the parties stipulated that the sole issues of "fact" remaining to be litigated were as follows:

> A. The Chickasaw Nation is beneficiary to treaties with the United States which agree that no state may pass laws for it. (Defendant contends that this is a question of law and not an issue of fact.)
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> B. Defendants have attempted to and are imposing state tax laws on the plaintiff tribal government and its constitutents [sic] in violation of said treaties, congressional enactments and federal policy. Such conduct by the defendant is preempted by federal law and infringes on plaintiff's right to self government and frustrates federal policy. (Defendant contends that this is a question of law and not an issue of fact.)

(Amended Pre-Trial Order at 4). With respect to the first issue, the Chickasaw point to treaty language stating that "no territory or state shall ever have a right to pass laws for the

government of the [Chickasaw] or their descendants."[1] The State responds that the treaties cited by the Chickasaw are not relevant because they were later abrogated by acts of Congress. The district court did not address the issue, finding that the taxes did not abridge the Tribe's right of self government and thus did not violate the treaty language. We agree with the State that both the continuing viability of the treaties cited by the Chickasaw and the interpretations thereof are questions of law and not of fact. Turning to the second stipulated issue remaining for trial, we conclude that whether the taxes imposed by the State contravene the aforementioned treaties and are violative of the Chickasaws' right to self-government is also a question of law rather than an issue of fact.

Accordingly, as the parties have stipulated to all of the facts before us, there can be no genuine issue of material fact remaining for litigation, and our review is limited to the question whether the substantive law was correctly applied. *Franks v. Nimmo*, 796 F.2d 1230, 1235 (10th Cir. 1986). We therefore review *de novo* the district court's treatment of both of these issues and their impact on the four taxes in dispute in this case.

II. BEER TAX

The Chickasaw operate retail stores in which they sell 3.2% beer. This beer is purchased from wholesale distributors. Oklahoma law provides for a tax upon 3.2% beer, in the amount of $11.25 per 31 gallons. 37 Okla. Stat. Ann. § 163.3 (West 1990). The district court concluded that the State of Oklahoma had a strong interest in regulating 3.2% beer and that under our holding in *Citizen Band Potawatomi v. Oklahoma Tax Com'n*, 975 F.2d 1459 (10th

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[1] The treaty actually refers to the Choctaw Nation rather than the Chickasaw. However, the treaty provisions were later applied by Congress to the Chickasaw. *See supra* n.9.

Cir. 1992), this regulatory authority encompassed the power to tax the sale of such beer. The district court thus assumed that the power to tax is encompassed within the power to regulate. We first address this assumption.

In *Rice v. Rehner*, 463 U.S. 713 (1983), the Supreme Court faced the issue whether California could require a member of an Indian tribe who operated a general store on an Indian reservation, in which she sold alcoholic beverages, to obtain a state liquor license. The Court set out a two-part test to determine when state regulation of activities in Indian country is preempted. *Id.* at 718. Such preemption occurs when application of state law: 1) "would interfere with reservation self-government," or 2) "would impair a right granted or reserved by federal law." *Id.* (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). In determining whether application of state law would interfere with Indian self-government, the court must consider the tradition of Indian sovereignty. If there is a tradition of Indian sovereignty in the area concerned, then an explicit statement from Congress providing that state law shall apply is usually required. *Id.* at 719-20. The *Rice* Court concluded that "tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians." *Id.* at 722.

Turning to the second prong of the test, the Court considered whether the state liquor licensing provisions were preempted by federal law. The Court held that, in enacting 18 U.S.C. § 1161,[2] Congress intended to delegate both to the

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[2] "The provisions of sections 1154, 1156, 3113, 3488, and 3669, of this title [barring introduction of alcoholic beverages into Indian country], shall not apply . . . to any act or transaction within any area of Indian country provided such act or transaction is in conformity both with the laws of the State in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country. . . ." 18

states and to the tribes, its authority to regulate liquor transactions. *Id.* at 730-31. Accordingly, the Court held that section 1161 authorized state regulation rather than preempting it, and the state could properly require tribe members to obtain a state liquor license. *Id.* at 734.

In *Potawatomi*, this court held that the Supreme Court's reasoning in *Rice* was applicable to Oklahoma's licensing requirements with respect to 3.2% beer, notwithstanding the argument that such beer was not an "alcoholic beverage" within the scope of § 1161 because of the bifurcated Oklahoma regulatory scheme classifying such beer as a "nonintoxicating beverage." *Potawatomi*, 975 F.2d at 1462-64. We held that Congress in § 1161 had delegated the authority to regulate liquor, including 3.2% beer, and that Oklahoma had a "significant regulatory interest" in 3.2% beer despite its classification as a "nonintoxicating beverage." *Id.* at 1464.

The Tribe argues that, notwithstanding the Court's statements in *Rice* about the power to "regulate" liquor transactions, and notwithstanding this court's statements on that matter in *Potawatomi*, that power has nothing to do with the power to tax those transactions. We agree that the power to regulate does not automatically encompass the power to tax in all circumstances. However, "[t]he mere fact a statute raises revenue does not imprint upon it the characteristics of a law by which the taxing power is exercised." *American Petrofina Co. of Texas v. Nance*, 859 F.2d 840, 841 (10th Cir. 1988) (quoting *State ex rel. Tindal v. Block*, 717 F.2d 874, 887 (4th Cir. 1983), *cert. denied*, 465 U.S. 1080 (1984)). Likewise, we do not find the fact that the beer taxes are deposited into the general treasury of the State of Oklahoma, Okla. Stat. Ann. tit. 37, § 163.6 (1992), determinative of the issue. Where the taxation is an integral

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U.S.C. § 1161 (1988).

part of the overall regulatory structure in a traditionally heavily regulated area, as opposed to a simple revenue measure, the tax may properly be considered to be regulatory and to fall within the regulatory authority. *See, e.g. Colville*, 447 U.S. at 158 (noting-that taxes may be used for regulatory purposes as well as for raising revenue). Such is the case here. Not only is the tax imposed on transactions involving a heavily regulated commodity, but the tax provisions themselves are contained within Title 37 of the Oklahoma Statutes, the portion of the Oklahoma Code establishing that regulation, rather than in the Revenue and Taxation Code contained in Title 68. The beer tax is thus clearly differentiated in the Oklahoma statutory structure from the sales, gasoline, and income taxes, which are included in Title 68. We therefore hold that the beer taxes at issue in this case are encompassed in the congressional delegation of authority to regulate the sale of alcohol in Indian country contained in 18 U.S.C. § 1161.

Moreover, even were we to conclude that the taxation of 3.2% beer is not part of the State's regulatory authority, we would conclude that the beer tax is valid because it is not a tax imposed on the Indian retailer. The statute provides that the following persons are liable for payment of the tax:

> (a) Manufacturers. When the sale is made by a manufacturer, located and doing business in this state, to a wholesaler, located and doing business in this state, the tax shall be *paid by the wholesaler.*
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> . . .
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> (b) Wholesalers. When the sale is made by a wholesaler, located and doing business in this state, to a retail dealer located and doing business in this state, the tax shall be *paid by the wholesaler.* Such wholesalers may sell only to licensed retail dealers nonintoxicating beverages upon which the tax provided by this act *has first been paid by such wholesaler.*

> When the sale is made by a wholesaler, located and doing business outside this state, and who has obtained an-Oklahoma wholesale beverage dealer's license, to a retail dealer located and doing business in this state, *the wholesaler shall be liable for and must pay* to the Tax Commission the beverage tax due on such sales. In the event of a retail dealer, doing business in this state, purchases beverage from a wholesaler doing business outside this state, and who does not have an Oklahoma wholesale beverage dealer's license, the retailer shall be liable for and must pay . . . the tax due on such sales. . . .
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> For the purpose of collecting and remitting the tax imposed under this act, the wholesaler collecting such tax is hereby declared to be the agent of the state for such purposes, and his failure to remit or pay such tax to the state, when due, shall constitute embezzlement, any such wholesaler, upon conviction, shall be punished as provided by law for the embezzlement of public funds.
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> (c) Retail Dealers. Retail dealers, where the out-of-state manufacturer or wholesaler has paid the tax under the provisions of this act, shall not be required to pay the tax. However, nothing in this act shall operate to relieve any retail dealer from payment of the tax where such retail dealer has at any time in his possession . . . nonintoxicating beverages upon which the tax has not been paid.

37 Okla. Stat. Ann. § 163.4 (West 1990 & Supp. 1994) (emphases added.

The Tribe argues that, since the statute does not explicitly provide that the legal incidence of the tax is on the consumer, as was the case in the cigarette tax considered in *Washington v. Confederated Tribes of Colville*, 447 U.S. 139 (1980), or on the wholesaler, the cases such as *Colville* upholding

cigarette taxes are inapplicable, and the tax must properly be seen as legally falling on the Indian retailers.

First, we observe that the Supreme Court has squarely rejected the idea that an explicit statutory mandate that the tax be "passed on and collected" is required in order to determine that the legal incidence of a tax does not fall on the Tribe. *California Bd. of Equalization v. Chemehuevi Tribe*, 474 U.S. 9, 11 (1986) (per curiam). Rather, the test to be derived from *Coleville* and analogous cases "is nothing more than a fair interpretation of the taxing statute as written and applied, without any requirement that pass-through provisions or collection requirements be 'explicitly stated.'" *Id.*; *see also*, *Colville*, 447. U.S. at 141-42 and n.9 (accepting conclusion that cigarette tax fell upon first event upon which tax can constitutionally be imposed, *i.e.* the sale to the consumer, despite lack of explicit statutory language imposing legal incidence of tax on consumer); *Indian Country, U.S.A. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 984 (10th Cir. 1987) (accepting district court's conclusion that legal incidence of Oklahoma sales tax fell on consumer despite lack of explicit provision so providing), *cert. denied*, 487 U.S. 1218 (1988).

A fair interpretation of the beer tax at issue here establishes that the legal incidence of the tax is on the beer wholesaler, and not on the Indian retailer. As set forth above, the statute specifically provides that the wholesaler must pay the tax. The wholesaler is liable for the tax when it first purchases the beer from the manufacturer and when it sells the beer to the retailer. In addition, the statute provides that the wholesaler may only sell beer upon which the tax *has first been paid*. The triggering event for the payment of the tax thus occurs before the sale to the retailer.

The Tribe argues that the triggering event for the imposition of the tax is the actual sale of the beer by the wholesaler to the tribal retailer. This argument is based on

the statutory language stating that *"[w]hen the sale is made* by the wholesaler, . . . *the tax shall be paid by the wholesaler."* 37 Okla. Stat. Ann. § 163.4(b) (emphasis added). According to the Tribe, since the trigger for the in,position of the tax is an event, *i.e.* the sale transaction itself, that occurs wholly in Indian country, the State has no jurisdiction to tax. This argument is dependent on an erroneous conception of the function of the word "when" in the statute. Contrary to the Tribe's characterization, we believe the word does not carry a temporal connotation, but instead serves as a substitute for the phrase "in the event that." Thus, the proper reading of the above-quoted language is "in the event that the sale is made by the wholesaler, . . . the tax shall be paid by the wholesaler." This construction is consonant with the structure of § 163.4, which sets forth a series of potential transactions, indicating which entity is responsible for paying the tax in each example, and is the only construction that is compatible with the requirement that a wholesaler only sell beer upon which the tax has *first* been paid.[3]

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[3] We are aware that the statute does make retailers responsible for paying the tax in two circumstances--when the retailer purchases beverage from a wholesaler located outside the state who does not have an Oklahoma wholesaler's license and who has not paid the tax, and in any other case where the retailer possesses beer upon which the wholesaler has not paid the tax. Okla. Stat. Ann. tit. 37, § 163.4(b)-(c). Neither situation is before us today. However, we note that the provisions of the statute making the retailer liable for the tax are evidently designed to give the retailer an incentive to ensure that the wholesaler has paid the tax, rather than to make the retailer primarily liable. Of course, in the event that the Tribe were to possess beer upon which the tax had not been paid, the Tribe's sovereign immunity would prevent the state from suing the Tribe to recover the tax. *See Oklahoma State Tax Com'n v. Potawatomi Indian Tribe*, 111 S. Ct. 905, 912 (1991). Thus, inasmuch as the statute provides for the Tribe's potential secondary liability, it is unenforceable. However, in light of the fact that the

The Tribe also points to the fact that the statute makes the wholesaler the agent of the state for purposes of "collecting" the tax as proof that the statute imposes the tax upon the retailer, *i.e.*, the Tribe, rather than upon the wholesaler. 37 Okla. Stat. Ann. § 163.4(b). After all, the Tribe argues, if the tax is "collected," it must be collected from someone, and that someone must be the retailer. We find this argument unpersuasive in light of the clear statutory language making the wholesaler liable for "paying" the tax. Rather, we conclude that the language making the wholesaler the state's agent for "collecting" the tax is intended to provide the theoretical basis for the remainder of that paragraph making the wholesaler liable for embezzlement of state funds in the event of a failure to remit the appropriate sums to the state.

Even if it were true that the economic burden of the tax falls on the Tribe because the wholesalers simply incorporate the tax into the wholesale cost, this would not be determinative of the question of the legal incidence of the tax. Just as a nondiscriminatory tax imposed on a private entity that does business with the United States and that passes the cost of that tax on to the United States does not violate federal sovereign immunity, *see South Carolina v. Baker*, 485 U.S. 505, 521 (1988) (quoting *Alabama v. King & Boozer*, 314 U.S. 1, 8-9 (1941)); *id.* at 523; *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 397 (1983), so a

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Tribe is required to have a valid state license to sell beer and those licenses are conditioned on compliance with the relevant laws, we believe that the statutory prohibition on retailers having in their possession beer on which the tax has not been paid provides the state adequate power to enforce the tax provisions without being required to sue the Tribe to recover the tax. If the Tribe were to possess beer on which the wholesaler had not paid the tax, the Tribe's liquor license could be revoked. *See* Oklahoma Stat. Ann. tit. 37, § 163.8; *id.* §163.11(I)(5)

nondiscriminatory tax imposed on non-exempt private entities that do business with Indian tribes and that pass the cost of those taxes on to the tribes does not violate tribal sovereign immunity. *See Seneca-Cayuga Tribe v. State ex rel. Thompson*, 874 F.2d 709, 715 (10th Cir. 1989) ("It has long been settled law that retained tribal sovereign immunity is co-extensive with that of the United States.").

The Supreme Court has validated the states' authority to collect sales taxes from wholesalers where an Indian tribe refuses to collect those valid taxes from its sales to non-members, *see Oklahoma Tax Com'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991), despite the fact that such sales taxes are likely to be passed on to the retailer as part of the wholesale price. We conclude that the state may similarly impose a beverage tax upon wholesalers as an integral part of the overall regulatory scheme, despite the possibility that such tax might be included as part of the wholesale price of the beer.

Accordingly, since we hold as a matter of law that the Oklahoma tax on 3.2% beer is authorized as part of the regulatory authority granted by Congress to the states and because we hold that the tax is a tax upon the wholesaler rather than upon the retailer, there can be no conflict with the Tribe's right to self-government, and the district court properly granted summary judgment in favor of the state on this issue.

III. MOTOR FUEL TAX

Oklahoma law imposes several taxes on motor vehicle fuel, totaling sixteen cents per gallon. Okla. Stat. Ann. tit. 68, §§ 502, 502.2, 502.4, 502.6, 516, 520 & 522 (1992). Corresponding taxes are imposed on-diesel fuel. *Id.* §§ 502.1, 502.3, 502.5, 502.7 & 522.1. The State exempts from these taxes fuel purchased by the tribe for use in tribally owned vehicles for tribal purposes. (Appellees' Br. at 10.) However, the State contends that when the Tribe purchases

fuel for resale at tribally owned gas stations, the tax must be paid. The Tribe argues that these taxes are imposed on the retailer, and consequently are void as direct taxes on the Tribe. The State responds that the taxes are passed on to the consumer in the retail price. The district court accepted the State's analysis as to the incidence of the taxes. The court then concluded that the taxes are not preempted by federal law, and passing to the second step of the analysis, concluded that the fuel taxes did not infringe on tribal sovereignty.

We believe that a fair reading of the statutes involved indicates that the district court erred in two respects. First, in concluding that the taxes were passed on through the retail price to the consumer, the district court substituted economic assumptions for the language of the statutes. The statutes nowhere require the amount of the tax to be included in the retail price at the pump, a requirement which we could interpret as imposing the tax on the consumer. *Cf.* Okla. Stat. Ann. tit. 68, § 302 (cigarette tax to be included in price to consumer). While the statutes do not expressly declare the legal incidence of the taxes to be on the retailer either, we believe that is the clear import of the statutory language.

The statutes imposing the fuel taxes provide that "[t]here is hereby levied an excise tax of [varying amounts] per gallon upon the sale of each and every gallon of gasoline sold, or stored and distributed, or withdrawn from storage, within the state, for sale or use, to be reported and collected as provided by law . . . ." *See, e.g., id.* § 502. The tax remittance procedure indicates that the incidence of the tax is on the retailer. The statute requires the distributors to make monthly reports indicating the amount of fuel received and sold by the distributor, and to remit to the Tax Commission the amount of tax due. *Id.* § 505(B)-(C). The statute goes on to provide that "[m]otor fuel taxes remitted by a distributor *on behalf of a licensed retailer* . . . that are subsequently determined to be uncollectible by the distributor may be credited against subsequent motor fuel tax liability imposed by law upon such

distributor." *Id.* § 505(C) (emphasis added). Thus, unlike the beer taxes at issue above, the statutes imposing the motor fuel taxes explicitly state that the distributor must remit the tax on behalf of the retailer. Similarly, the statute provides that if the distributor pays the taxes and is subsequently unable to collect the money from the retailer, the distributor may deduct the uncollected amount from its future payments. The statute thus ensures that the distributor is not burdened with the tax. In the fuel tax scheme, the distributor is no more than a transmittal agent for the taxes imposed on the retailer.

Moreover, the exemptions provided in the fuel tax statutes also indicate that the tax is not imposed on the distributor. For example, the exemption for fuel purchased for agricultural use provides that "[e]very person actually engaged in farming . . . *may purchase such motor fuel without paying the tax.*" *Id.* § 509 (b) (emphasis added). The same section provides that the person involved in agriculture ar. claiming the exemption must apply for an exemption permit, which he must show to the distributor. *Id.* § 509(d)-(e). Similarly, § 505 of Title 68 gives the retailer the option of paying the tax due on all diesel fuel, or meeting the requirements to be considered a distributor. *Id.* § 505(E). Section 505 thus also indicates that the retailer is responsible for paying the tax.

We think it evident that the import of the language and the structure of the fuel tax statutes is that the distributor collects the tax from the retail purchaser of the fuel. While it may well be that the tax is ultimately passed on to the consumer at the pump, the question is whether the statutes in question legally impose the taxes on the Tribe. The question of who bears the ultimate economic burden of the tax is distinct from the question of on whom the tax has been imposed. *See White Mountain Apache*, 448 U.S. at 151 n.15; *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392, 397 (1983).

Having determined that the motor fuel taxes are legally imposed on the retailer rather than on the distributor or the consumer, we next confront the second error committed by the district court. The district court concluded that the motor fuel taxes were not federally preempted. This conclusion may have been based on the assumption that the statutes imposed the taxes on the consumer. However, since we conclude that the taxes are imposed on the retailer, we must consider the issue of preemption.

State activity is preempted by federal law when either of two independent barriers is present: if application of state law "would interfere with reservation self-government," or "would impair a right granted or reserved by federal law." *Rice*, 463 U.S. at 718 (quoting *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). When determining whether application of state law would interfere with Indian self government, the court must consider the tradition of Indian sovereignty. If there is a tradition of Indian sovereignty in the area concerned, then preemption is presumed absent an explicit statement from Congress that state law shall apply. *Id.* at 719-20.

The activity with which we are here concerned is the taxation of motor fuel. Motor fuel, unlike alcoholic beverages, is not a traditionally heavily regulated commodity and the fuel taxes are not part of a comprehensive regulatory scheme. The fuel tax is a simple revenue raising measure of the sort commonly imposed by sovereign governments to fund their activities. Unlike the beer tax, the motor fuel taxes are contained in Title 68 of the Oklahoma statutes, the Revenue and Taxation Code. Here, the proceeds of the fuel tax go almost exclusively to the building and maintaining of highways in the state of Oklahoma, both within Indian country and without. This fact does not alter the nature of the fuel taxes as simple revenue measures. Because they are directed toward funding traditional government activities, the taxes fall within the ambit of the sovereignty of the tribal

government. Accordingly, the district court erred in concluding that imposition of the fuel tax on the tribal retailer was not preempted by federal law. Where the state action conflicts with a power within the traditional scope of Indian sovereign authority, preemption is presumed in the absence of an explicit statement of congressional intent to the contrary. *Rice*, 463 U.S. at 719-20. The state has directed our attention to no such explicit grant of congressional approval of the taxation scheme here at issue and we know of none.[4] Because the presumption of preemption is an independent barrier to the exercise of state authority in Indian country, the district court erred in requiring the Tribe to show that the fuel taxes infringed on the right of tribal self-government. Consequently, the district court's balancing of the respective tribal and state interests at stake was not relevant to the determination of the propriety of the fuel taxes. We therefore hold as a matter of law that the district court erred in granting summary judgment in favor of the State on this issue. We reverse the grant of summary judgment in favor of the state and the district court's denial of the Tribe's motion for summary judgment. We direct the trial court to grant summary judgment in favor of the Tribe on the question of the imposition of the state motor fuel taxes on Indian retailers.

IV. SALES TAXES

The third tax contested by the Tribe in the district court was the 4.5% Oklahoma sales tax codified at Okla. Stat. Ann. tit. 68, § 1354 (Supp. 1994). The Tribe objected that the

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[4] In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 n.16 (1980), the Supreme Court declined to reach the question whether Indian reservations might be encompassed by the Hayden-Cartwright Act, 4 U.S.C. § 104, which provides for the imposition of state fuel taxes "on United States military or other reservations." This issue was not raised before this court, and we express no opinion on it.

State was requiring retail dealers selling to the Tribe at retail to collect the sales tax from the Tribe. The district court granted summary judgment to the State. At oral argument, it became apparent that the sales tax dispute centered on a misconception engendered by a previous position of the Oklahoma State Tax Commission, which position has since been clarified. The State had furnished a letter clarifying its policy on this issue to the Oklahoma Gas and Electric Company in January, 1993. During oral argument counsel for the State indicated that the contents of that letter represented the current State position on the sales tax. The Tribe stated that it did not object to the current State policy, but argued that the State should be required to let retailers in the area know of the new sales tax policy. In light of this development at oral argument, we vacate the district court's grant of summary judgment in favor of the State on the question of the imposition of the sales tax, and we reprint *in haec verba* the contents of the letter explaining the current State position on the sales tax:

> [I]t is the position of the Business Tax Division that sales to an Indian tribe are exempt from state and local sales taxes as outlined in the Division's exemption letter of January 21, 1988, which was provided to all federally-recognized Indian tribes in Oklahoma.
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> However, the 1988 letter indicates that the exemption is limited to purchases made by the Tribe for governmental use as opposed to business use. In order to clarify the Division's position, I will further outline the proper limits of the exemption as the Division understands them.
>
> A tribe may purchase taxable goods and services exempt from sales taxes if the tribe purchases the item directly, makes payment for the purchase directly and if the tribe is the consumer/user of the item, whether the

item is used in tribal governmental offices or in a tribally-owned and operated business place.

Therefore, in order to be entitled to the exemption, the sale must satisfy the following requirements:

1. The sale must be made directly to the federally recognized Indian tribe.
2. Payment must be received directly from the tribe.
3. The tribe must be the consumer or user of the purchased good which is consumed or used within Indian Country.

In order to document these requirements your company should maintain the following records:

1. Invoices or statements of account should be billed to the tribe in its officially recognized name and mailed to the tribe.
2. Payment in the form of a bank draft should be drawn on an account owned by the tribe in its name.
3. The location at which the service is established should be owned and operated by the tribe on its Indian Country.

This exemption does not extend to individuals, corporations, partnerships, or other business or legal entities who are purchasing items which may be used on Indian Country and which are purchased ostensibly "for the Tribe" or for business ventures under tribal license or contract with private parties. The exemption only applies to transactions with a federally-recognized Indian tribe itself.

The exemption also does not extend to purchases of items which a tribe does not use itself, but which it intends to resell to the general public from a business

> place on Indian Country for the purpose of marketing a tax exemption to those who would otherwise be required to pay sales taxes elsewhere.

(Appellant's Reply Br. Exh. A.) As the Tribe has no objection to the sales tax policy as expressed in the letter, we need not examine the matter further.[5]

IV. INCOME TAX

The final issue contested by the Tribe is the imposition of the Oklahoma state income tax on wages paid by the Tribe to persons employed by the Chickasaw Nation on tribal trust lands. The district court ruled this question moot in light of this court's holding in *Sac and Fox Nation v. Oklahoma Tax Comm'n*, 967 F.2d 1425 (10th Cir. 1992). In *Sac and Fox*, we held that, absent explicit congressional authorization, the state lacked jurisdiction to tax the income of tribal members earned on tribal reservations. In so holding, we relied on the Supreme Court's decision in *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973), to conclude that the residency of the tribal member-employee was irrelevant to the question of immunity from the state income tax. *Sac and Fox*, 967 F.2d at 1428 n.3. The State filed a petition for certiorari before the Supreme Court on the issue of the applicability of

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[5] Much of the State's Brief on appeal treated the sales tax dispute as though it were based on the Tribe's objections to the State's decision to collect sales taxes from wholesalers selling to the Tribe for resale. The Tribe insisted in its Brief and in its Reply Brief that this was a misstatement of the issue. The Tribe explicitly denied any objection to the current State practice of collecting the sales tax from wholesalers selling to the Tribe for resale, reiterating that its sole objection was to the collection of sales taxes on retail purchases made by the Tribe. In light of the Tribe's characterization of the issue, we need not address the question of the State's requirement that wholesalers selling to the Tribe for resale pay the sales tax.

the income tax to employees who are enrolled members of the Tribe. The Sac and Fox also filed a petition for certiorari on the issue of the applicability of the income tax to non-member employees. The Supreme Court denied the petition of the Sac and Fox, 113 S. Ct. 466 (1992), and granted the State's petition. 113 S. Ct. 459 (1992). After the district court dismissed this final issue as moot, the Supreme Court vacated our decision in *Sac and Fox* as to the tribal member employees and remanded the case. 113 5. Ct. 1985 (1993). The Supreme Court held that while residency in Indian country was sufficient to invoke the *McClanahan* presumption against state jurisdiction to impose an income tax on the income of tribal members earned on tribal reservations, this court had erred in concluding that residency was irrelevant to the *McClanahan* analysis. *Id.* at 1991. The Court concluded that because all of the Indians in question might live in Indian country, there was no need to consider the question whether Indians not living in Indian country might also be outside the taxing jurisdiction of the state. *Id.* at 1992. The Court remanded the case for a determination of the residency of the Indians concerned. We further remanded the case to the district court for a residency determination. 7 F.3d 925 (10th Cir. 1993).

The Tribe conceded in its brief on appeal that, with respect to tribal member employees, this issue would be controlled by the Supreme Court's ultimate resolution in *Sac and Fox*, which had not been decided at the time the briefs were filed. At oral argument, the Tribe contended that despite the Supreme Court's holding in *Sac and Fox*, the specific treaties between the Chickasaw and the government of the United States barred the imposition of the state income tax on the wages of tribal members employed by tribal businesses, regardless of the residence Of those members. The Tribe also asserted at oral argument that, notwithstanding the Supreme Court's decision in *Sac and Fox*, the State is barred by the relevant treaties from applying its income tax

to the income of non-members earned from their employment by tribal businesses on tribal lands.

We first address the validity of the income tax as applied to non-member employees. We hold that the question of the applicability of the Oklahoma income tax to the wages of non-members earned from employment on tribal lands is controlled by this court's decision in *Sac and Fox*. As we noted there, the Supreme Court has generally approved nondiscriminatory taxation of nonmember activities, "so long as such taxation does not conflict with relevant statutes or treaties or impermissibly interfere with a tribe's ability to govern itself." *Sac and Fox*, 967 F.2d at 1429. The Tribe does not contend that the income tax imposed on non-members in any way interferes with the Tribe's ability to self-govern. Instead, the Tribe relies on the treaty language that "no territory or state shall ever have a right to pass laws for the government of the [Chickasaw Nation] or their descendants" for the proposition that such taxation is barred. (Appellant's Br. at 11). We find this argument unpersuasive on two accounts. First, on its face, the treaty language prohibits the states only from passing laws governing the Tribe and its descendants, not non-members. It is settled that the income tax is imposed on the employee, not the employer: "The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable." *United States v. County of Fresno*, 429 U.S. 452, 461 n.9 (1977) (quoting *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 480 (1939)). Therefore, to the extent that the income tax is imposed on non-member employees who have no established claim to tribal ancestry, the tax does not infringe upon the treaty prohibition.[6]

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[6] The fact that the Tribe might be required to withhold and submit the tax does not constitute an unreasonable burden on the Tribe's ability to govern itself. *Colville*, 447 U.S. at 159-60; *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 483

Second, the Supreme Court has rejected the proposition that the economic burden of the income tax is passed on through the employee to the employer in such a way as to interfere with the Tribe's right to govern itself so as to mandate holding the employees immune from the state income tax. *Id.* The purpose of tax immunity

> was not to confer benefits on the employees by relieving them from contributing their share of the financial support of the other government, whose benefits they enjoy, or to give an advantage to a government by enabling it to engage employees at salaries lower than those paid for like services by other employers, public or private, but to prevent undue interference with the one government by imposing on it the tax burdens of the other.

Id. Since the income tax is not a tax on the source of the income, it does not impose any burden on the tribal government. While the Court in *County of Fresno* and in *Graves* was discussing the tax immunity of federal rather than tribal employees, this difference is not determinative, as "it has long been settled law that retained tribal sovereign immunity is co-extensive with that of the United States." *Seneca-Cayuga Tribe*, 874 F.2d at 715; *see Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989). We accordingly hold that the Oklahoma income tax is valid as imposed on non-member employees of Chickasaw businesses on tribal land.[7]

(1976).

[7] We need not decide whether, in the event that the Tribe were to impose its own income tax upon the salary of non-members employed in tribal businesses, such a tax would be entitled to the same treatment as the federal income tax under Okla. Stat. Ann. tit. 68, § 2358(D)(8), which provides for the deduction of the amount of such tax from the Oklahoma adjusted gross income for purposes

We now consider the question of the validity of the Oklahoma income tax as applied to tribal members earning income from tribal employment in Indian country. In *Sac and Fox*, the State of Oklahoma argued that the *McClanahan* presumption against state tax jurisdiction over Indians was limited to Indians living on the Sac and Fox *reservation*, and was not applicable to Indians living in Indian country. As noted above, this court in *Sac and Fox* disagreed and concluded that, under the rule of *McClanahan*, imposition of a state income tax on the income of tribal members earned from tribal employment in Indian country was presumptively barred regardless of the residence of the members, in the absence of express congressional authorization. The Supreme Court reversed and remanded, ruling that the residency of the tribal member was "a significant component of the *McClanahan* presumption against state tax jurisdiction," and that to the extent that this court had ruled without such a reference to residency, this court had erred. *Sac and Fox*, 113 S. Ct. at 1991. The Court held, however, that *McClanahan* was not limited to Indians living on a formal reservation, and that residency in Indian country was sufficient to invoke the *McClanahan* presumption against tax jurisdiction. *Id.* With respect to tribal members residing either on the formal reservation or in Indian country and earning income from tribal employment in Indian country, we think it clear that pursuant to *Sac and Fox* the rule of *McClanahan* continues to bar imposition of the state income tax.[8]

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of calculating the Oklahoma income tax, or under any analogous provisions of state law.

[8] We give no credence whatsoever to the State's argument that the "disestablishment" of the reservation allegedly incurred as a result of the Dawes Act of 1891 removed any bar to state taxing jurisdiction. The Supreme Court has thrice rejected this notion, twice when presented by the same litigant. *See Sac and Fox*, 113

We next turn to the somewhat more difficult question of the validity of the state income tax as applied to the income of tribal members employed by tribal businesses in Indian country, but who do not reside either on the formal reservation or in Indian country. The State contends that this issue is controlled by the Supreme Court's decision in *Sac and Fox*. Accordingly, the State argues that the bar to state tax jurisdiction is limited to Indians living on the reservation or in Indian country.

The State's position fundamentally misreads the Court's holding in *Sac and Fox*. In construing *Sac and Fox*, it is important to view the opinion in context. The Court in that case decided a limited question, namely, whether an Indian living in Indian country but not on the formal reservation was

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S. Ct. at 1991; *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 477-479 (1976). We assume, with all the dangers inherent in assumptions, that, sooner or later, the State will tire of presenting this argument. *See Sac and Fox*, 967 F.2d at 1428 n.2 ("It appears as though the State of Oklahoma persists in fighting a battle it has already lost."). *See also Indian Country, U.S.A. v. Oklahoma Tax Comm'n*, 829 F.2d 967, 975 n.3 (10th Cir. 1987), *cert. denied sub nom Oklahoma Tax Comm'n v. Muskogee Creek Nation*, 487 U.S. 1218 (1988) ("The State seems to believe that the Indian country status of the [reservation] rests on whether the exterior boundaries have been disestablished. It does not. . . . Tribal lands, trust lands, and certain allotted lands generally remain Indian country despite disestablishment."). *Cf. Hagen v. Utah*, 1994 U.S. LEXIS 1869 (Feb. 23, 1994). In *Hagen*, the Court concluded that the Uintah reservation had been "diminished" by various acts of Congress, and that therefore a town originally within the reservation was now outside the reservation and subject to state criminal jurisdiction. Notwithstanding the diminishment of the Uintah reservation in *Hagen*, there was no question but that the land within the diminished reservation retained its status as Indian country.

encompassed within the *McClanahan* presumption against state tax jurisdiction. As previously discussed, the Court rejected the State's contentions in *Sac and Fox* and held that such Indians were within the scope of *McClanahan*. The *Sac and Fox* Court did not address the question with which we are faced in this case. The Court did, however, indicate that Indians living outside Indian country but earning their salary from tribal employment in Indian country might nevertheless be outside the taxing jurisdiction of the state.[9] *Id.* at 1992. Thus, the Court recognized that the issue in both *McClanahan* and *Sac and Fox* was the applicability of the *presumption* against state tax jurisdiction, rather than the ultimate determination of whether such jurisdiction existed. This question, which the Court left unresolved, is the issue before us today.

Consonant with the distinction between the presumption against tax jurisdiction and the ultimate question of the existence of such jurisdiction, the Supreme Court in *Sac and Fox* did not rule that the residency of the tribal members on the reservation or in Indian country was the controlling factor in the ultimate determination whether an income tax could validly be applied to the income of tribal members employed in Indian country. Rather, such residency is a "significant component" merely of the *presumption* against state tax jurisdiction, and residency in Indian country is sufficient to invoke the benefit of that presumption. *Sac and Fox*, 113 S. Ct. at 1991. To read the Court's decision in *Sac and Fox* as holding categorically that an Indian must live on the formal

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[9] While the Court made this statement with respect to the tribe's right to self-government rather than preemption by federal law, the latter argument was not raised in *Sac and Fox*. As the right to self-government and preemption by federal law are each independently sufficient bars to the application of state law, we do not believe that the Court's reference to the right to self-government in any way implies that federal preemption would not suffice.

reservation or in Indian country in order for taxation to be barred, one would have to ignore the plain meaning of the term "presumption," as well as the fact that the Court expressly acknowledged the possibility that such taxation might be barred even as applied to Indians not living on the formal reservation or in Indian country. *See id.* at 1992 (declining to decide whether taxation might be barred by tribe's right to self-government, independently of its territorial jurisdiction over Indian country); *cf. Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (distinguishing between state's lack of authority to tax income arising from activities *occurring on the reservation* and the power to tax income arising from activities off the reservation). Under such a view, rather than being a "significant component" of the presumption, residency on the reservation or in Indian country would be dispositive of the entire preemption determination. We do not believe such was the Supreme Court's intent. We therefore conclude that the proper interpretation of the Court's decisions in *Sac and Fox* and in *McClanahan* is that they merely establish a presumption in favor of Indians and against state tax jurisdiction over Indians living in Indian country and earning income from activities in Indian country. With respect to Indians living outside Indian country but earning income from activities within Indian country, that presumption does not exist. A lack of a presumption, however, is not equivalent to a determination that the state may impose its tax. Rather, the absence of the presumption merely affects the burden-shifting engendered by the presumption. In the absence of the presumption against state tax jurisdiction, the initial burden is no longer on the state to show that there has been an explicit congressional grant of authority to tax in order to overcome the presumption. Instead, where Indians living outside Indian country are concerned, the initial burden remains on the tribe to show that the tax is barred by one of the two independent barriers to the exercise of state jurisdiction over Indians, *i.e.*

interference with reservation self-government or impairment of rights granted or reserved by federal law.

While in *Sac and Fox* the tribe argued--and the Court refused to decide--that the tribe's right to self-government barred the tax, in this case the Chickasaw argue that the taxation is barred by the relevant treaties between the Tribe and the United States, which are, of course, federal law. Applying the rule set forth above, we now turn to the question whether, in the absence of the *McClanahan* presumption, the Tribe has met its burden of showing that the state income tax is preempted as applied to tribal member employees not residing in Indian country but earning their income from tribal employment in Indian country.

"The beginning of our analysis must be with the treaty which the United States Government entered with the [Chickasaw Nation]." *McClanahan*, 411 U.S. at 173-74. This analysis requires a particularized examination of the specific treaties involved in this case. In *McClanahan*, the Supreme Court construed the treaty between the United States and the Navajo Nation in 1868. That treaty provided for the setting aside of land "for the use and occupation of the Navajo tribe of Indians," and stated

> that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employ[ee]s of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

Id. at 174. The Court noted that this language did not constitute an explicit statement that the Navajos were to be exempt from state law or state taxes. Nevertheless, applying the general rule that "[d]oubtful expressions are to be resolved in favor of" the Indians, *id.* (alteration in original) (citation omitted), the Court concluded that the state was

barred from imposing its income tax upon the Navajo members on income derived from employment on tribal lands. In so doing, the Court emphasized that the question before it was a narrow one: "whether the State may tax a *reservation Indian* for income earned exclusively on the reservation." *Id.* at 168 (emphasis added).

In light of the ambiguous language of the Navajo treaty and the narrow question before the Court in *McClanahan*, it is not unduly surprising that the Court in *Sac and Fox* declined to fashion from *McClanahan* a blanket exemption from state income taxation for all tribal members. This is especially true when one considers that the *Sac and Fox* Court was faced with treaty language even more ambiguous than that in *McClanahan*. The treaty between the United States and the Sac and Fox Tribe provided no more than that the land that the United States ceded to the Sac and Fox "shall remain the property of said Sac and Fox Nation, to the full extent that it is now the property of said Nation--subject only to the rights of the United States therein. . . . and subject to the rights, legal and equitable, of those persons that are now legally located thereon. . . ." *Sac and Fox*, 113 S. Ct. at 1988.

In stark contrast to the language in the treaties between the United States and the Navajo and the Sac and Fox, respectively, the language in the treaty between the Chickasaw and the United States is abundantly clear. Article IV of that treaty provides as follows:

> The Government and the people of the United States are hereby obliged to secure to the said [Chickasaw] Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that *no Territory or State shall ever have right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants*; and that no part of the land granted them shall ever be embraced in

> any Territory or State; but *the U.S. shall forever secure said [Chickasaw] Nation from, and against all laws* except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.

7 Stat. 333 (emphasis added).[10] In 1866, the United States reaffirmed the above obligations, Stating that

> [a]ll the rights, privileges, and immunities heretofore possessed by said nations or individuals thereof, or to which they were entitled under the treaties and legislation heretofore made and had in connection with them, shall be, and are hereby declared to be, in full force, so far as they are consistent with the provisions of this treaty.

Treaty of April 28, 1866, 14 Stat. 769, Art. XLV; *id.* Art. X. These obligations were again reaffirmed in 1871, which reaffirmation stands to this day. *See* 25 U.S C.A. § 71 (West Supp. 1994). *See also* Oklahoma Enabling Act, § 1, 34 Stat. 267, 267-60) (1906) ("[N]othing contained in [the Oklahoma Constitution] shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories . . . .").

In comparison to the treaty at issue in the *Sac and Fox* case, the Chickasaw treaty explicitly provides that no state

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[10] The treaty actually refers to the Choctaw, rather than the Chickasaw. However, in 1837, the Choctaw consented to the formation of a district within their reservation for the Chickasaw, "to be held on the same terms that the Choctaws now hold it." Treaty of January 17, 1837, 11 Stat. 573, Art. I. Thus, the Chickasaw became the beneficiaries of the above language referring to the Choctaw.

would ever be permitted to pass laws for the government of the Chickasaw or their descendants. The crucial question in determining the validity of the income tax under the relevant treaty language is therefore whether the law is one imposed on the Chickasaw Nation or its descendants. Residency is simply not relevant to this determination. We believe that, reading the treaty as the Indians would have understood it, and construing any ambiguities in the treaty language in favor of the Indians as we must, *see McClanahan*, 411 U.S. at 174, the specific treaty involved in this case preempts the imposition of the state income tax on the wages of Chickasaw members, earned on the reservation or in Indian country, regardless of the residence of those members. Accordingly, we hold that, consistent with the Supreme Court's decision in *Sac and Fox*, the Oklahoma income tax may not be imposed on the income of Chickasaw tribal members, earned from tribal enterprises on the reservation or in Indian country, regardless of whether the tribal member actually lives on the reservation or in Indian country.[11] We therefore vacate the district court's dismissal of this issue as moot, reinstate the claim, and direct the district court to grant summary judgment in favor of the Tribe on this issue.

V. CONCLUSION

To summarize, we AFFIRM the district court's grant of summary judgment in favor of the State on the issue of the imposition of the tax on 3.2% beer. We REVERSE the grant of summary judgment in favor of the State on the issue of the imposition of the state motor fuel taxes, and we direct the district court to GRANT summary judgment in favor of the Tribe on this issue. We VACATE the district court's grant of summary judgment in favor of the State on the issue of the

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[11] In so holding, we do not suggest that the state may not impose its income tax on the income of tribal member employees earned outside Indian country. This issue is not before us.

sales taxes. With respect to the income taxes, we AFFIRM the district court's grant of summary judgment in favor of the State on the question of the imposition of the state income taxes on non-member employees of tribal businesses on Chickasaw Indian country. We VACATE the district court's dismissal as moot on the question of the imposition of the state income tax on the wages of tribal member employees earned from tribal employment in Indian country, and who live in Indian country, we REINSTATE the Tribe's claim on this issue, and we direct the district court to GRANT summary judgment in favor of the Tribe on this issue. We similarly VACATE the district court's dismissal as moot on the question of the taxation of the income of tribal member employees earned from tribal enterprises in Indian country, but who do not reside in Indian country. We also REINSTATE that claim, and we direct the district court to GRANT summary judgment in favor of the Tribe on that issue.

AFFIRMED in part, VACATED in part, REVERSED in part, and REMANDED with instructions.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR the EASTERN DISTRICT OF OKLAHOMA

CHICKASAW NATION,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
STATE OF OKLAHOMA ex rel. OKLAHOMA TAX COMMISSION, et al.,	)	No. 91-310-NJ
	)	
	)	
Defendants.	)	

ORDER

Now before the court for determination are cross-motions for summary judgment, as well as the responses and replies thereto. The instant case was stricken from the May 4, 1992, Non-jury Trial Docket upon stipulation of the parties that the case be decided upon the pleadings. The issues as framed in the Amended Joint Pretrial Order are as follows:

(1) Whether defendants may lawfully impose state beer taxes on plaintiff by requiring the wholesale vendor to include such taxes in the price of beer sold to tribally owned retail outlets on tribal trust lands.

(2) Whether defendants may lawfully impose state motor fuel taxes on plaintiff by requiring the wholesale vendor to include such taxes in the price of motor fuel sold to tribally owned retail outlets on tribal trust lands.

(3) Whether defendants may lawfully impose state sales taxes on plaintiff on retail purchases it makes for tribal use from retail vendors.

(4) Whether persons employed by plaintiff on tribal trust lands must pay state income taxes on wages paid them by Plaintiff.

It is agreed by the parties that Plaintiff is a federally recognized tribe, and that Plaintiff owns and operates retail sales outlets on lands held in trust by the United States on which it sells tobacco products, motor fuel, beer and other goods. Plaintiff does not collect sales taxes an its sales to tribal or non-tribal members but is required to pay sales taxes on motor fuel products and beer when it purchases them from its wholesale vendors at said retail locations. Defendants impose sales taxes on retail purchases of goods made by Plaintiff where Defendants contend such goods are used for "propietray" as opposed to "governmental" purposes and when Defendant contends the goods are purchased for resale to non-tribal members.

Beer Tax

The Tribe sells 3.2% beer, beer containing 3.2% alcohol by weight, at its convenience stores an tribal trust lands. Sales are made to tribal members and nonmembers. The State imposes a tax on 3.2% beer by requiring the wholesale beer distributors to include the beer tax in the wholesale price of the beer. The tax is passed on, through the retailer, ta the ultimate consumer as a cost of the product which is included as part of the retail price. Okla. Stat. tit. 37, § 163.4 (1990).

The Tribe directly challenges the Commission's application of state law against the Tribe an its own territory, arguing that such application contravenes both federal law and Chickasaw treaty rights. Further, it is the Tribe's contention that if such laws can be applied, they are unlawful if they impact sales to tribal members and therefore, exemptions should be afforded the Tribe on sales to its tribal members. The Commission takes the position that the Tribe is obligated to comply with State beer laws. Under Federal law, 18 U.S.C. § 1154(a), the sale of "malt...liquor, including beer"

is prohibited in Indian Country. Title 18 U.S.C. § 1161 lifts this prohibition if the transaction is in conformity with bath State laws and tribal ordinances. *See Rice v. Rehner*, 463 U.S. 713, (1903) (Congress authorized state regulation over Indian liquor transactions by enacting Section 1161 and that Congress intended that state laws would apply of their own force to govern tribal liquor transactions).

In 1959, Oklahoma amended its constitution, eliminating the state prohibition on "intoxicating liquors." Okla. Const. art. 27, § 11 (1959) (repealed 1904). The Oklahoma Constitution now provides that "[t]he Legislature shall enact laws providing for the strict regulation, control, licensing, and taxation of the manufacture, sales distribution, possession, and transportation of alcoholic beverages..." Okla. Const. art. 28, § 3. "The Oklahoma legislature has since enacted the Alcoholic Beverage Laws Enforcement Act, Okla. Stat. Ann. tit. 37, §§ 501-599 (West 1990 & Supp. 1992), regulating the sale and distribution of statutorily defined "intoxicating" beverages. Under this act, the licensing and regulation of "intoxicating" beverage sales are under the authority of the Oklahoma Alcoholic Beverage Laws Enforcement Commission, *see Id.* § 514, while the licensing, regulating and taxing of "nonintoxicating" beverage sales, including 3.2% beer remain with the Tax Commission." *Citizen Band Potawatomi v. Oklahoma Tax Commission*, Nos. 91-6312 & 91-6312, 1992 U.S.App. LEXIS 22870 (10th Cir. September 21, 1992).

While the Alcoholic Beverage Laws Enforcement Commission is responsible for the licensing and regulation of "intoxicating" beverage sales, the Tax Commission maintains responsibility for the collection of state excise taxes on such beverages, *see* Okla. Stat. Ann. tit. 37, §§ 542-543, 545-546, 553 (West 1990), and for issuing distributor and wholesaler permits to aid in the collection of such taxes. *Id.* §§ 543.1-543.2.

At the time this issue was briefed by the parties, they did not have the benefit of a recent Tenth Circuit opinion, *Citizen Band potawatomi*, *supra*, holding that Oklahoma has a substantial interest in regulating 3.2% beer, notwithstanding its statutory definition as a "nonintoxicating" beverage. More importantly, the court held that the Tribe lacked sovereign immunity in the regulation of liquor. In light of these findings the court construes both federal and state statutory law to allow the imposition of a tax on beer sold by the Tribe, there being no discriminatory effect to disallow an exemption on sales to tribal members.

Motor Fuel Tax

The Tribe purchases motor fuel and other petroleum for use and sale on tribal lands. Motor fuel taxes are similar to beer taxes in that the motor fuel distributors are required to report and remit the tax on fuel sold to retailers. The retailer's wholesale price will include the motor fuel taxes which are in turn included in the retail price at the pump. Okla. Stat. tit. 68, §§ 505, 506, (1990). It is the position of the Tribe that this is a direct tax to the tribe, and further, the scheme does not allow for exemptions to tribal members. The Commission states that exemptions have been previously granted to Indian tribes for motor fuel purchased for use in tribally owned vehicles used for tribal government purposes only and not for resale. The Commission argues, however, that in the instant case of first impression, the Tribe attempts to avoid payment of taxes on all motor fuel it purchases for resale.

Although Indian tribes retain attributes of sovereignty over both their members and their territory, this is not to say that the laws of a State can have no force within reservation boundaries. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). "As a result, there is no rigid rule by which to resolve the question whether a particular state law

may be applied to an Indian reservation or to tribal members." *Id.*

In *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), the Supreme Court found two independent barriers to application of State law on Indian Country. First, the exercise of such authority may be preempted by federal law. Second, it may unlawfully infringe, "on the right of reservation Indians to make their own laws and be ruled by them." *Id.* Federal law does not preempt the state motor fuel tax scheme. Therefore, the Tribe must show that the motor fuel tax infringes on the right of tribal self-government.

The principal of tribal self-government, grounded on notions of inherent sovereignty, and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other. *Washington v. Confederatated Tribes of Colville*, 447 U.S. 134 (1980). In *Colville* the Court entered a balancing approach to determine whether State cigarette taxes were applicable to cigarette sales on the Colville Reservation. The Court stated:

> While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at the off-reservation value and when the taxpayer is the recipient of state services.

In Oklahoma the gasoline transported onto Indian Country is for resale only and is used almost exclusively off of Indian Country on State jurisdiction roads. Exemptions are available to Indian tribes for motor fuel purchased for use in tribally owned vehicles used for tribal government purposes.

The Court in *Colville* noted, "We do not believe that principles of federal Indian law, whether stated in terms of pre-exemption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere."

Further, the Tribe does not construct or maintain roads and highways for the use of the general public in Oklahoma. The State of Oklahoma constructs and maintains 111,412.76 miles of streets, roads and highways in Oklahoma which is funded by the state tax on motor fuel. All of the road mileage maintained by the state is off Indian Country. Therefore, the gasoline tax used to maintain these roads is directed at off-reservation value where the taxpayer is receiving State services, whether the taxpayer is a tribal member or not.

"Congress has passed laws under which Indians have become full-fledged citizens of the State of Oklahoma. Oklahoma supplies for them and their children schools, roads, courts, police protection and all the other benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. If some pay less, others must pay more...' Only the same duties are exacted as from our own citizens. The burden must rest somewhere. Revenue is indispensable to meet the public necessities. Is it unreasonable that this small portion of it shall rest upon these Indians?'" *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943) (citations omitted). In this context, the patrons of tribal gas stations are properly subject to the State's motor fuel taxes.

Sales Tax

The Tribe is exempt from sales taxes on items it purchases for its own governmental use. However, it is the Contention of the Commission that when the Tribe purchases inventory for resale at the tribal store, the Tribe is not exempt from collecting the sales tax and remitting it to the State. The Tribe argues that the imposition of the sales tax an tribal members on tribal lands is not authorized by law, and further

refuses to collect said taxes. *See Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 111 S.Ct. 905 (1991); *Citizen Band Potawatomi Indian Tribe v. Oklahoma Tax Commission*, 969 F.2d 943 (10th Cir. July 14, 1992).

The Oklahoma Sales Tax, similar in nature to the motor fuel tax, is to paid out pursuant to the direct appropriation by the Legislature for the good of the citizens of Oklahoma. Okla. Stat. tit. 68, § 1353 (1990). The rationale discussed in relation to the motor fuel tax is appropriately applied to the sales tax which is imposed upon tribal members and non-Indians alike. The burden of paying for the many services provided by the State and enjoyed by all its citizens must be borne equally between tribal members and non-Indians alike.

Income Tax

The final issue concerning the application of Oklahoma's Income tax law has been decided by the Tenth Circuit in *Sac and Fox Nation v. Oklahoma Tax Commission*, 967 F.2d 1425 (10th Cir. June 16, 1992). Therefore, this issue is moot.

ACCORDINGLY, the court find that Defendants' Motion for Summary Judgment should be granted and Plaintiff's Motion for Summary Judgment should be denied.

IT IS SO ORDERED this 30th day of September, 1992.

FRANK H. SEAY
UNITED STATES DISTRICT JUDGE

APPENDIX C

Article IV of the Treaty With the Chocktaw of Sept. 27, 1830, provides:

The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U.S. shall forever secure said Choctaw Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.

Okla. Stat, Tit. 68, § 501C provides in relevant part:

Nothing in this section shall require a distributor, dealer or retailer to collect taxes levied by this act or remit taxes to the state on diesel fuel used exclusively for purposes other than to propel motor vehicles over the public highways of this state as provided in Section 509 of this title.

Okla. Stat., Tit. 68, § 505C provides:

Every distributor, at the time of making the monthly reports required by this section, shall remit to the Tax Commission the amount of tax due.

It shall be unlawful for any distributor, retailer or dealer to sell or offer for sale in this state, motor fuel or diesel fuel while delinquent in the payment of any excise tax due the state.

Motor fuel taxes remitted by a distributor on behalf of a licensed retailer of the distributor or collected on behalf of a nonlicensed purchaser of motor fuel that are subsequently determined to be uncollectible by the distributor may be credited against subsequent motor fuel tax liability imposed by law upon such distributor. For purposes of this subsection, motor fuel taxes collected on behalf of a licensed retailer of the distributor or collected on behalf of a nonlicensed purchaser shall be deemed uncollectible if such taxes are deducted for purposes of calculating the federal income tax liability of the distributor. The method for crediting uncollectible motor fuel taxes as provided by this subsection shall be prescribed in rules and regulations of the Oklahoma Tax Commission.

Okla. Stat., Tit. 68, § 509(b) provides in relevant part:

Every person actually engaged in farming in Oklahoma or in a state which borders the State of Oklahoma and buying motor fuel to be used as fuel for farm tractors or stationary engines owned or leased and operated by him and used exclusively for agricultural purposes, who has obtained an agricultural exemption permit, as provided in this article, may purchase such motor fuel without paying the tax levied by Section 502 of this title and one-half cent ($0.005) per gallon of the tax levied by Section 516 of this title.

Okla. Stat., Tit. 68, § 509.2 (Supp. 1994) provides in relevant part:

A. The tax levied by this act shall not apply to diesel fuel used exclusively for purposes other than to operate motor vehicles on the public highways of this state. Provided that distributors shall execute on monthly reports, certification that the purchasers represented to the seller that the diesel fuel was to be used exclusively for purposes other than to operate motor vehicles on the public highways.

* * *

C. Any person who places diesel fuel that was purchased under an exemption permit authorized by this section into the fuel tank of a motor vehicle for use in operating the motor vehicle on the public highways shall be liable for the taxes levied under Sections 502.1, 502.3, 502.5, 502.7 and 522.1 of this title. Further, the permit issued shall be subject to cancellation and if so canceled shall not be reissued for a period of at least one (1) year. Such person shall also be guilty of a misdemeanor and shall, upon conviction, be fined not more than One Thousand Dollars ($1,000.00), or shall be sentenced to a term of not more than one (1) year in the county jail.

* * *

E. The tax levied by Sections 502.1 and 522.1 of this title shall not apply to diesel fuel used exclusively in passenger motor buses or coaches, having a seating capacity of ten or more persons, when such fuel is purchased by and used exclusively in public transit systems operated by any county, city or town of this state, or by any public trust created under the laws of this state of which a county, city or town of this state is the sole beneficiary thereof. Provided this exemption shall be allowed only when supported by a certificate executed by such city or trust on forms prescribed and furnished by the Oklahoma Tax Commission.

F. The tax levied by Sections 502.1 and 522.1 of this title shall not apply to diesel fuel purchased by any county, city or town for use as fuel to propel motor vehicles on the public roads and highways of this state, when said vehicles are being operated for the sole benefit of said county, city or town; provided that if the diesel fuel is placed directly into the fuel supply tank or tanks of the motor vehicle by the supplier, certification must be made on the invoice and all such sales must be reported by the supplier on forms furnished by the Oklahoma Tax Commission.

Okla. Stat., Tit. 68, § 527 provides:

A. Gasoline, diesel fuel or special fuels used solely and exclusively in district-owned public school vehicles or FFA and 4-H Club trucks for the purpose of legally transporting public school children shall be exempt from all state taxes; and gasoline, diesel fuel or special fuels purchased by any school district for use exclusively in school buses leased or hired for the purpose of legally transporting public school children, or in the operation of vehicles used in driver training, shall also be exempt from all state taxes.

B. Gasoline, diesel fuel or special fuels used solely and exclusively as fuel to propel motor vehicles on the public roads and highways of this state, when leased or owned and being operated for the sole benefit of a county, city, town, or a volunteer fire department with a state certification and rating, shall be exempt from all state taxes levied by this title. Provided, if the gasoline, diesel fuel or special fuels are placed directly into the fuel supply tank or tanks of the motor vehicles by the supplier, certification must be made on the invoice and all such sales must be reported by the supplier on forms provided by the Oklahoma Tax Commission.

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No. 94-771

In The

Supreme Court of the United States

October Term, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the legal incidence of Oklahoma's motor fuel tax falls upon the retailer or the ultimate consumer of the fuel?

2. Whether, if the legal incidence of Oklahoma's motor fuel tax falls on the retailer, and the retailer is a federally-recognized Indian tribe conducting business in Indian country, federal law precludes imposition of the state tax directly on the tribe?

3. Whether the Treaty of September 27, 1830 precludes state taxation of the income of Chickasaw tribal members who are employed directly by the government of the Chickasaw Nation within Chickasaw Indian country, but who reside outside of Indian country?

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No. 94-771

In The

Supreme Court of the United States

October Term, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

Petitioner maintains that "[t]his case involves a 'vexing' and 'intricate' question . . . : how to 'reconcile the plenary power of the States over residents living within their borders with the semi-autonomous status of Indians living on tribal reservations.' " Petition at 7. At the very highest level of generality, that may be true – but *only* to the extent that *any* case in which the relative boundaries of state and tribal jurisdiction are in issue raises such questions. Virtually all Indian-law cases do. But when viewed at the level of specificity appropriate to a decision by this Court on a Petition for Certiorari, the case involves nothing more than a decision whether the Tenth Circuit was correct in determining that the legal incidence of Oklahoma's motor fuel tax is on the retailer of

the fuel, and whether that Circuit's interpretation of a United States/Choctaw Nation[1] treaty, see Treaty of September 27, 1830, 7 Stat. 333, was correct.

Two of Petitioner's Questions Presented are also phrased in sweeping terms (as is necessary for Petitioner to defend the certworthiness of the case). Its third Question Presented, for example, inquires broadly "whether *federal law* precludes state taxation of the income of Indians who work on tribal trust lands but live outside of Indian country." Petition at i (emphasis added). Such a formulation might mislead this Court into believing that this case presents the issue whether state taxation of the Indian-country income of tribal members (whether or not employed by their tribe)[2] who reside outside Indian country is foreclosed by the "infringement" principle of *Williams v. Lee*, 358 U.S. 217, 220 (1959).[3] It does not.

Petitioner's formulation may also suggest to this Court that this case presents the issue whether such taxation is precluded by application of the "preemption/balancing" test, as applied in cases such as *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). It does not.[4]

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[1] As Petitioner correctly notes, Petition at 7 n.2, Respondent Chickasaw Nation is the other beneficiary of that treaty.

[2] Petitioner omits from that Question the fact that in this case, all such Indians who are so employed are *members* of the Chickasaw Nation *employed directly by the tribal government*. The formation employed in *Respondent's* third Question Presented remedies that defect by reducing the question to its appropriate level of specificity. *See supra* at i.

[3] As Petitioner correctly observes, Petition at 6, this Court, in *Oklahoma Tax Commission v. Sac and Fox Nation*, 113 S.Ct. 1985 (1993), declined to resolve that question, having found the issue not properly before it on the facts of that case. *Id.* at 1992.

[4] In the Court of Appeals' opinion, that court, prior to noting the Tribe's reliance on relevant treaties, erroneously stated that "[t]he Tribe conceded in its brief on appeal that, with

Petitioner's second Question Presented – concerning the legal incidence of Oklahoma's motor fuel tax – is factbound, involving no more than an *application* of this Court's "fair interpretation" pronouncement in *California State Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9, 11 (1985). And its first Question Presented, which reduces to whether federal law precludes the imposition of a state tax directly on an Indian tribe with respect to its activities in Indian country, *compare* Petition at i *with supra* at i (Respondent's formulation of the issue), presents no novel question whatsoever, as this Court has long adhered to a *per se* rule precluding such taxation absent congressional authorization, *e.g.*, *Cabazon Band*, 480 U.S. at 215 n.17 (citing cases), and cases such as *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 142 & n.9 (1980), and *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 481-82 (1976), expressly based their holdings on the premise that the legal incidences of the taxes there in issue were on non-Indian consumers, not the retailing tribes.

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respect to tribal member employees, this issue would be controlled by the Supreme Court's ultimate resolution in *Sac and Fox*, which had not been decided at the time the briefs were filed." *Chickasaw Nation v. Oklahoma Tax Comm'n*, 31 F.3d 964, 974 (10th Cir. 1994), *petition for cert. filed*, 63 U.S.L.W. 3371 (U.S. Oct. 31, 1994) (No. 94-771), *reprinted in* Petition at 20a. Nowhere in the Chickasaw Nation's brief was such a concession made. Brief for Appellant *passim*, *Chickasaw Nation*, 31 F.3d 964 (No. 92-7117). Rather, Respondent Chickasaw Nation indicated that the *Tenth Circuit's* opinion in that case – which precluded state income taxation of *all* member-earned income from tribal employment (this rendering the Chickasaw Nation's treaty-based argument *unnecessary*), *see Sac and Fox Nation v. Oklahoma Tax Comm'n*, 967 F.2d 1425, 1428-29 & n.3 (10th Cir. 1992), *vacated and remanded, Sac and Fox*, 113 S.Ct. 1985, was controlling *pending review by this Court*. Brief for Appellant at 28, *Chickasaw Nation*, 31 F.3d 964 (No. 92-7117).

Petitioner points to no inter-circuit or federal court/state court conflict, and, as the preceding paragraph (and subsequent argument) reveal, its Questions Presented raise no "important question of federal law which has not been, but should be, settled by this Court." See SUP. CT. R. 10.1(c). All such questions presented by this case are well-settled, as *Sac and Fox*, *Cabazon Band*, *Moe*, *Colville*, and *Chemehuevi*, among numerous other cases, well illustrate.

Apart from that, Respondent will establish that the Court of Appeals' decision was *correct*.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PETITIONER PRESENTS ARE PROFOUNDLY FACTBOUND, AND THEIR RESOLUTION BY THIS COURT WOULD RESOLVE NO ISSUE OF NATIONAL IMPORTANCE.

A. The First Two Questions Presented by Petitioner Rise or Fall With the Correctness of the Court of Appeals' Conclusion Regarding the Legal Incidence of Oklahoma's Motor Fuel Tax.

Since Petitioner Tax Commission's second Question Presented both logically and analytically precedes its first, Respondent will address that question at the outset. That question inquires "[w]hether the legal incidence of Oklahoma's tax on motor fuel falls upon the ultimate purchaser of the fuel." Petition at i.

Excluding its "importer" and "special fuel" provisions, see OKLA. STAT. tit. 68, §§ 601-723 (1991 & Supp. 1993), the core of Oklahoma's fuel tax scheme consumes twenty-two pages of double-column print in the unannotated official version of *OKLAHOMA STATUTES*. Both the nature of the Question Presented, and the nature of Petitioner's and Respondent's countervailing arguments concerning the legal incidence of the tax, *compare* Petition at 20-23 *with infra* at 16-21, reveal the profoundly factbound nature of the issue concerning the legal incidence of the

tax established by that complex and lengthy statutory scheme.

Moreover, although the omission was directed to the attention of Justice Breyer (as well as Petitioner) when Petitioner unsuccessfully applied to this Court for a stay of the Court of Appeals' mandate in this case, *see* Response to Application for Stay at 8 & n.6, *Oklahoma Tax Commission v. Chickasaw Nation* (No. A-227) (U.S. 1994), Petitioner again defaults on any attempt to direct this Court's attention to the motor fuel tax schemes of other states substantially identical in material respect to Oklahoma's. Although the burden is on Petitioner to demonstrate the certworthiness of this case, Respondent has researched the fuel tax schemes of the twelve states with the largest Indian populations and/or the greatest quantity of Indian country. That research reveals that none of the other states has a fuel tax scheme substantially similar to Oklahoma's in material respect: each places the legal incidence of the tax either "upstream" of the retailer (on the distributor), or "downstream" of the retailer (on the ultimate consumer).[5]

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[5] *See* ARIZ. REV. STAT. ANN. § 28-1501 (West Supp. 1993) ("every distributor shall pay to the state . . . a license tax of seventeen cents for each gallon"); CAL. REV. & TAX. CODE ANN. § 7351 (West Supp. 1994) ("For the privilege of distributing motor vehicle fuel, a license tax is hereby imposed upon distributors for each gallon. . . . "); IDAHO CODE § 63-2402(1) (1989) ("A tax is hereby imposed for the privilege of using the public highways upon the use or possession for use of gasoline. . . . "); MINN. STAT. ANN. § 296.17(1) (West 1991) ("It shall be the duty of every . . . person who uses gasoline . . . if the tax . . . has not been paid . . . to report to the commissioner . . . , and such person shall become liable for the payment of the tax."); MONT. CODE ANN. § 15-70-204 (1993) ("Every distributor shall pay . . . a license tax for the privilege of . . . carrying on business in this state in an amount equal to . . . 27 cents per gallon. . . . "); N.M. STAT. ANN. § 7-13-3 (Michie Supp. 1994) ("For the privilege of receiving gasoline in this state, there is imposed an excise tax . . .

The fact that eleven of the twelve largest Indian-country states – all save Oklahoma – have found a way to legislatively accomplish that objective counsels strongly against the grant of certiorari, since no issue of more than local import is presented by the incidence-of-the-fuel-tax question. Petitioner Tax Commission goes so far as to assert that Oklahoma could accomplish precisely its desired result "by declaring the tax to fall on the consumer and directing the Tribe to collect and remit the levy." Petition at 17. Surely this Court would not impose too great a burden on the state were it to deny certiorari and effectively require Oklahoma to amend its motor fuel tax scheme (assuming that the state legislature wishes so to do). In any event, Respondent respectfully submits that this Court does not sit to rectify the drafting errors of the Oklahoma legislature, and such may not have been errors at all, since it is more than conceivable that that legislature *intended* for the incidence of the tax to fall on the fuel

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of . . . twenty cents . . . per gallon received. . . . "); N.M. STAT. ANN. § 7-13-2.K (Michie 1993) (defining "received"); N.Y. TAX LAW § 284 (McKinney Supp. 1994) ("excise tax . . . upon motor fuel . . . imported into . . . the state. . . . or . . . if the tax has not been imposed prior to its sale in this state, which is sold by a distributor. . . . "); N.C. GEN. STAT. § 105-434 (1992) ("excise tax . . . on motor fuel sold, distributed, or used by a distributor. . . . "); *In re Newsom Oil Co.*, 273 N.C. 383, 386, 160 S.E.2d 98, 101 (1968) ("The tax imposed by G.S. § 105-434 is a privilege tax."); N.D. CENT. CODE § 57-43.1-02(2) (1993) ("The dealer shall collect the tax imposed by this section from the consumer on all sales."); S.D. CODIFIED LAWS ANN. § 10-47A-8 (Supp. 1994) ("excise tax on all motor fuel . . . sold or used"); *State v. City of Sioux Falls*, 60 S.D. 330, 332-33, 244 N.W. 365, 367 (1932) (South Dakota tax neither fuel nor sales tax, but rather tax on privilege of operating motor vehicles); WASH. REV. CODE ANN. § 82.36.100 (West Supp. 1994) ("Every person . . . who acquires any motor fuel within this state . . . and . . . in any manner uses it in this state shall, if the tax has not been paid . . . pay an excise tax at the [same] rate. . . . ").

retailer for reasons wholly unrelated to the Indian-law issues presented by the instant case.

All the above has focused on the factbound nature of Petitioner's second Question Presented. Its first apparently seeks to have this Court revisit its long line of holdings establishing a *per se* rule forbidding direct state taxation of Indian tribes regarding their Indian country activities absent congressional authorization. While Respondent will later establish that neither this Court nor any court of appeals has ever tolerated such taxation, *infra* at 21-25, four observations should suffice for present purposes. First, that issue cannot be reached without review of the factbound incidence-of-the-fuel-tax question. Second, since *as Petitioner itself notes*, *supra* at 6 (quoting Petition at 17), a stroke of the pen from the Oklahoma legislature may well resolve the entire problem, this case presents no compelling justification for revisiting firmly established and century-old caselaw. Third, Congress has been aware of this Court's *per se* rule for a *very* long time, *infra* at 24, and this Court has long been reluctant to overrule its own caselaw in nonconstitutional matters remediable by Congress upon congressional perception that the settled result was or was becoming unsatisfactory.[6] And fourth, while Petitioner erroneously contends that the decision below "threatens to cause enormous confusion about state authority in an area of great concern both to the State and to Indian tribes," Petition at 8, in reality, the reverse is true: the *per se* rule, which traces back well over a hundred years,[7] has

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[6] A recent Indian-law decision furnishes a typical example. In *Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe*, 498 U.S. 505, 510 (1991), this Court for that reason rejected an invitation from the same litigant who appears as Petitioner in the instant case to overturn decades-old tribal-sovereign-immunity caselaw.

[7] Immediately following the Civil War, this Court recognized the immunity of Indian *lands* from state taxation. *The New*

been consistently followed, and establishes a bright-line rule which has proved workable in practice. Revisiting that line of caselaw, not denying certiorari herein, would upset settled expectations, and replacing the extant bright-line rule (with which all federal courts are familiar) with *any* other principle would precipitate the doctrinal uncertainty about which Petitioner purports to be so concerned.

B. Resolution of Petitioner's Third Question Presented is Contingent Upon the Correctness of the Court of Appeals' Interpretation of the Treaty of September 27, 1830.

Petitioner's third Question Presented, which concerns the opposability of its income tax to tribally-employed members of the Chickasaw Nation, is equally factbound and uncertworthy. Two tribes – the Choctaw and Chickasaw Nations – are beneficiaries of the 1830 treaty, and Petitioner correctly notes that both the Creek Nation and Seminole Nation have similar provisions. Petition at 28. But based on diligent research, Respondent notes that those are the *only* tribes in Oklahoma with such sweeping treaty guarantees. And although Respondent has not researched the treaty histories of all the United States' more than five hundred tribes (though it has researched a substantial number), it appears that due to the unique nature of the United States' historical relation to (and removal of) the Five Civilized Tribes, the only in-force guarantees as sweeping as those provided in the 1830 treaty are enjoyed by the Choctaw, Chickasaw, Creek, and Seminole Nations. But even should Petitioner

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York Indians, 72 U.S. (5 Wall.) 761, 770 (1867); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867). Later, the "federal instrumentality" doctrine protected tribes from state taxation of numerous forms. *See generally Carpenter v. Shaw*, 280 U.S. 363, 366 (1930) (citing cases); *infra* at 23-24 (same).

be able to identify an isolated few tribes with similar in-force guarantees (a doubtful proposition), it must be recalled that the only circumstance in which the guarantee that no state shall pass laws for tribal *governments, see infra* at 26-27 (quoting 1830 treaty), becomes relevant in the context of state taxation (as is the issue herein) is with respect to income of member employees of those *governments* who reside outside of Indian country. *See, e.g., Sac and Fox,* 113 S.Ct. at 1991 (resident member employees already exempt); *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 179-81 (1973) (same). Given the radical difference between Oklahoma's fragmented and checkerboarded "reservations," *see generally Oklahoma Tax Commission v. Citizen Band Potawatomi Tribe,* 498 U.S. 505, 511 (1991) (trust land as "reservation"), and the large and contiguous reservations of virtually all other Indian-country states, it is equally doubtful that many employees of non-Oklahoma tribal governments live "off reservation." Thus, since the treaty guarantees in question are likely limited to four Oklahoma tribes; since the factual context of the issue is also overwhelmingly limited to Oklahoma; and since the two immediately-following subpropositions will demonstrate that this case presents no additional (non-treaty) issue concerning the opposability of the state's income tax, the income-tax question, like the fuel-tax question, fails to present any issue of national import.

C. This Case Does Not Raise the Question Whether State Taxation of the Income of Tribal Members Employed Directly by their Tribe Within its Indian Country, but Residing Outside of Indian Country, Constitutes Impermissible Infringement of the Right to Tribal Self-Determination.

This Court recently declined to pass upon the question whether state taxation of the income of non-resident member employees of an Indian tribal government is

precluded by the "infringement" principle of *Williams v. Lee*, 358 U.S. 217, 220 (1959). *Oklahoma Tax Commission v. Sac and Fox Nation*, 113 S.Ct. 1985, 1992 (1993). But as in *Sac and Fox*, that question is not presented herein.

In the Court of Appeals below, Respondent intensely briefed and argued its contention that relevant treaties preempted, *see generally infra* at 11 n.9 (distinguishing "normal" preemption from "preemption/balancing"), the state income tax on non-resident member tribal employees. Brief for Appellant at 7-17, 28-29, *Chickasaw Nation*, 31 F.3d 964 (No. 92-7117); Reply Brief of Appellant at 1-3, *Chickasaw Nation*, 31 F.3d 964 (No. 92-7117). Petitioner Tax Commission responded in kind. Answer Brief of Appellee at 4-8, 19-20, *Chickasaw Nation*, 31 F.3d 964 (No. 92-7117). But "infringement" was neither briefed nor argued to the court,[8] which expressly noted that

> [w]hile in *Sac and Fox* the tribe argued – and the Court refused to decide – that the tribe's right to self-government barred the tax, *in this case the Chickasaw argue that the taxation is barred by relevant treaties between the Tribe and the United States*. . . .

Chickasaw Nation, 31 F.3d at 977, *reprinted in* Petition at 27a (emphasis added). The "infringement" question, in consequence, is not presented to this Court in the instant case.

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[8] One caveat must be added to the above observation. In its Brief-in-Chief to the Court of Appeals below, Respondent Tax Commission did assert that since "[f]ederal law does not preempt the state motor fuel tax . . . , *the Tribe must show that the motor fuel tax infringes on the right of tribal self-government.*" Answer Brief of Appellee at 13, *Chickasaw Nation*, 31 F.3d 964 (No. 92-7117) (emphasis added). But that assertion was made in the context of the *fuel* tax, not the income tax at issue in the instant subproposition. More fundamentally, in a non sequitur of considerable dimension, the Tax Commission then devoted the following three pages of its brief to arguing not "infringement," but "preemption/balancing." *See id.* at 13-16.

D. This Case Does Not Raise the Question Whether State Taxation of the Income of Tribal Members Employed Directly by their Tribe Within its Indian Country, but Residing Outside of Indian Country, is Foreclosed by Federal Common Law Preemption/Balancing Principles.

Every observation in the immediately preceding subproposition is as applicable, *mutatis mutandis*, to the "preemption/balancing" issue in the income-tax context as it was to the "infringement" question. In short, neither party briefed or argued that issue to the Court of Appeals, and that court confined its analysis to the treaty questions raised.[9]

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[9] To be sure, the Court of Appeals held that the treaties "preempted" the opposability of the state's income tax on nonresident member employees of the Tribe. *Chickasaw Nation*, 31 F.3d at 979, *reprinted in* Petition at 30a. But "normal" statutory (or treaty) "preemption," *see generally* U.S. CONST. art. VI, § 2 (supremacy clause); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986) (discussing "normal" preemption), and the "preemption/balancing" test which evolved from *McClanahan*, 411 U.S. at 172-73, *see, e.g., Cabazon Band*, 480 U.S. at 216-21, are two very different things. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983) ("Although a State will certainly be without jurisdiction if its authority is pre-empted under familiar principles of pre-emption, we cautioned that our prior cases did not limit pre-emption of state laws affecting Indian tribes to only those circumstances."). For ease of identification (and to eliminate any possible misconception concerning the nature of its argument), Respondent Chickasaw Nation has identified "normal," supremacy-clause-based preemption as "normal preemption" or "preemption" throughout this Brief, and the *sui generis* Indian-law preemption doctrine which developed from *McClanahan*, and which requires the balancing of state, federal, and tribal interests, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980), as "preemption/balancing."

II. PETITIONER HAS FAILED TO DEMONSTRATE THE EXISTENCE OF ANY INTER-CIRCUIT OR FEDERAL COURT/STATE COURT CONFLICT.

Petitioner has called this Court's attention to no such conflict, and Respondent, which has diligently researched the issue, is aware of none.

III. THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. The Court of Appeals Correctly Determined that Federal Law Precludes the Imposition of Oklahoma's Motor Fuel Tax on the Chickasaw Nation.

1. *This Court has historically and consistently given great deference to courts of appeals' interpretations of state law.*

It is this Court's "practice to accept a reasonable construction of state law by the Court of Appeals 'even if an examination of the state-law issue without such guidance might have justified a different conclusion.' " *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983). Petitioner recognizes as much. Petition at 22-23.

In an attempt to navigate around that well-settled principle, Petitioner once again retreats to the highest conceivable level of generality, contending that this "Court has been vigilant in policing decisions that will disrupt the delicate and complex adjustments of sovereign power between States, Indian tribes, and the United States." Petition at 23. As Respondent earlier noted (in

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In the income-tax context, all parties exclusively argued "normal" preemption, based on the treaties, to the Court of Appeals below, and where "normal" preemption is found (as did that court), "preemption/balancing" questions need not be reached. *Mescalero Apache*, 462 U.S. at 333-34. They were not.

only a slightly different context), *supra* at 1, *virtually every Indian law case, in every state and federal court,* involves "delicate and complex adjustments" of the relative jurisdictional boundaries of those three sovereigns. Thus, Respondent's fundamental limiting principle proves too much, and is consequently no limiting principle at all.

Nor are Petitioner's subordinate limiting principles, see Petition at 23, ("in the setting presented by this case"); *id.* (discussing *Chemehuevi*), availing for purposes of evading the state-law-deference principle. As this Court is well aware, *Chemehuevi* does *not* hold that all state taxes involving tribal retailers are conclusively presumed to be consumer taxes. *Infra* at 14-15. *Neither does* Chemehuevi, *or this Court's "vigilan[ce] in policing [Indian law] decisions,"* Petition at 23, *or any meta-principle of non-Indian jurisprudence, support the proposition that all cases in which courts of appeals* (after careful analysis) *conclude that the legal incidence of such taxes are on Indian tribes are ipso facto certworthy, or the proposition that all such decisions should be summarily vacated and remanded,* see *id.* (perhaps so suggesting), *in light of* Chemehuevi. Were any permutation of the above suggestion to be adopted, the lower federal courts' role with respect to state-law questions in Indian-law cases would be an atrophied one, indeed.

2. California Board of Equalization v. Chemehuevi Indian Tribe *holds neither that all state taxes involving tribal retailers are conclusively presumed to be consumer taxes, nor that such taxes must be construed as consumer taxes where* any *ambiguity exists in a complex and lengthy state-taxation scheme.*

In *Chemehuevi,* this Court held foursquare that the legal incidence of a state tax may fall on the ultimate consumer despite the absence of any statutory provision expressly so stating, and despite the absence of any explicit "pass on and collect" provision. 474 U.S. at 11.

Rather, this Court held, "[t]he test to be derived from cases such as *Colville* and *Moe* . . . is nothing more than a *fair interpretation* of the statute as written and applied. . . ." *Id.* (emphasis added). Both in cases immediately following *Chemehuevi*, *e.g.*, *Indian Country, U.S.A. v. Oklahoma Tax Commission*, 829 F.2d 967, 984 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988) (holding that legal incidence of Oklahoma's sales tax falls "downstream" of the retailer, on the ultimate consumer, despite absence of express statutory language so providing), and in the instant case, *Chickasaw Nation*, 31 F.3d at 969, *reprinted in* Petition at 9a (holding that legal incidence of Oklahoma's beer tax falls "upstream" of the retailer, on the beer wholesaler), the Tenth Circuit has demonstrated its mastery of the *Chemehuevi* principle.

But *Chemehuevi* does *not* support any of the following three propositions, on which Petitioner implicitly relies.

First, it does not hold that all state taxes involving tribal retailers are conclusively presumed to be consumer taxes. Such an interpretation is foreclosed both by the "fair interpretation" language of *Chemehuevi* itself, 474 U.S. at 11, and by the lengths to which this Court went in *Moe* and *Colville* to establish that the legal incidences of the taxes there in question were *not* on the retailing tribes (thereby rendering the *per se* rule inoperative in those cases). *See Colville*, 447 U.S. at 142 & n.9; *Moe*, 425 U.S. at 481-82.

Second, for the same reasons, *Chemehuevi* does not hold that all state taxes *must* be construed to be consumer (or wholesaler) taxes where any ambiguity whatsoever exists in complex and lengthy state taxation schemes. This Court has made clear that absent express provisions specifically identifying the locus of the tax, such schemes must be construed *as a whole*.

Third, *Chemehuevi* does not hold that the *legal* incidence of a tax is irrelevant for purposes of application *vel non* of the *per se* rule against state taxation of Indian tribes regarding their Indian-country activities, or that the *legal*

incidence may be rendered secondary (or otherwise marginalized) by economic assumptions about whether ultimate consumers will "really" wind up "paying" the tax.[10]

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[10] *Compare* Petition at 8-9 (so arguing) *with Department of Taxation and Finance v. Milhelm Attea & Bros., Inc.*, 114 S.Ct. 2028, 2034 (1994) ("[T]he cigarette tax in *Moe* fell upon a class – non-Indians – whom the State had power to tax.") *and id.* at 2035 ("New York's regulations . . . stand[ ] on a markedly different footing from a tax imposed directly on . . . tribal organizations. . . . ") *and id.* at 2037 (emphasis and bracketed material in original) (finding that state had not "impose[d] a . . . tax *on Indian retailers*") *and Chemehuevi*, 474 U.S. at 11 (emphasis added) (focusing on "test for whether *legal* incidence of . . . tax falls on purchasers") *and Colville*, 447 U.S. at 142 & n.9 (affirming three-judge court's conclusion regarding *legal* incidence of tax) *and Confederated Tribes of the Colville Indian Reservation v. State of Washington*, 446 F.Supp. 1339, 1356-57 (E.D. Wash. 1978), *aff'd in relevant part and rev'd in part on other grounds, Colville*, 447 U.S. 134 (three-judge court expressly finding *legal* incidence-of-the-tax determination essential to avoiding *per se* rule forbidding direct state taxation of tribes regarding on-reservation activities) *and Moe*, 425 U.S. at 481-82 (expressly rejecting *tribal* contention that *legal* incidence of state tax was irrelevant since tribal retailer would "really" wind up "paying" the tax).

The "Indian trader" cases also furnish analogous precedent. In *Milhelm Attea*, this Court only last Term went to great lengths to explain that neither the cigarette tax nor any other state tax in that case imposed its *legal* incidence on exempt Indian traders. *See* 114 S.Ct. at 2034-35. *See also id.* at 2036 (discussing *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 164 (1980), and *Warren Trading Post v. Arizona Tax Comm'n*, 380 U.S. 685, 691 (1965)).

3. *"Fairly interpreted," the legal incidence of Oklahoma's motor fuel tax falls upon the retailer of the fuel – in this case, the Chickasaw Nation.*

At every stage of the instant litigation below, Petitioner Tax Commission vigorously maintained that the legal incidence of Oklahoma's motor fuel tax was on the *wholesale distributor.* Answer Brief of Appellee at 8, *Chickasaw Nation,* 31 F.3d 964 (No. 92-7117) (emphasis added) ("[T]he *beer* tax shall be *paid by the wholesaler.*"); *id.* at 9 (emphasis added) (in *beer* tax context, "[t]he Tribe's sovereignty does not . . . exempt *wholesalers* from paying valid state taxes); *id.* at 10 (emphasis added) ("*Motor Fuel taxes are similar to beer taxes* in that the motor fuel *distributors* are required to . . . remit the *tax on fuel sold to retailers.*"); *id.* (emphasis added) ("[T]he Tribe cannot exempt *distributors of motor fuel* from state law."); Brief in Support of Defendants' Motion for Summary Judgment at 10-11, 15, *Chickasaw Nation v. Oklahoma ex rel. Oklahoma Tax Commission* (E.D. Okla. 1992) (No. CIV-91-310-C) (making identical arguments).

Astoundingly, for the first time before this Court, Petitioner Tax Commission now does a 180-degree pirouette, abandons the central premise of its former fuel-tax argument (which it had pursued through three years of litigation below), and urges to this Court – with equal sincerity and conviction – that the legal incidence of the motor fuel tax is *really* on the *ultimate consumer!* Petition at 20-23. In such a context, at the very least, Petitioner's representation to this Court that *"the State consistently has understood the incidence of the tax to fall on the consumer," id.* at 17 (emphasis added), lacks credibility of the most fundamental kind.

Petitioner then adds a fallback contention: that the *legal* incidence of the fuel tax *does not matter at all,* since "really," the "economic burden," *id.* at 8, 11, "falls on the

ultimate consumer," *id.* at 8. This contention, like Petitioner's new "legal incidence" contention, is also impeached by Petitioner's own earlier argumentation, which expressly noted that "the search for taxes included in the wholesale price *could look back forever*," Brief in Support of Defendants' Motion for Summary Judgment at 11, *Chickasaw Nation* (E.D. Okla. 1992) (No. CIV-91-310-C) (emphasis added), strongly suggesting that the *legal* incidence of state taxes *does* matter. (Respondent notes that for precisely the same reasons, the search could look *forward* forever, as well.)

In responding to Proposition I in the Tax Commission's Petition, Respondent will treat Petitioner's former contention that the legal incidence of the fuel tax is on the wholesale distributor as abandoned; will rebut Petitioner's new contention that its legal incidence is on the ultimate consumer (insofar as space permits) in the instant subproposition; and will rebut Petitioner's "fallback" argument that the legal incidence of the tax is irrelevant in the immediately following subproposition.

Oklahoma's motor fuel tax scheme, which places the incidence of the tax on the *retailer* (in this case, the Chickasaw Nation), differs materially from both the fuel tax schemes of other states, *supra* at 5-6 & n.5, and the cigarette-tax scheme at issue in *Chemehuevi*. Unlike the tax at issue in *Chemehuevi*, *see* 474 U.S. at 11 ("California Rev. & Tax. Code Ann. § 30107 . . . clearly seems to place on consumers the obligation to pay the tax for all previously untaxed cigarettes."), Oklahoma's scheme contains no provision making consumers as consumers responsible for payment of the tax. To the contrary, Oklahoma law specifically provides that motor fuel taxes are "remitted by a distributor *on behalf of" the retailer*. OKLA. STAT. tit. 68, § 505(C) (Supp. 1993) (emphasis added). State law also provides that the distributor is "made an agent of the state" for the collection of the tax. *Id.* § 506(a) (1991). And the "collection" is *from the retailer*. *Id.* § 505(C) (Supp.

1993) (emphasis added) ("[m]otor fuel taxes remitted by a distributor *on behalf of* a licensed *retailer*"). *Cf. id.* § 505(E) (Supp. 1993) (emphasis added) (Any *retailer or dealer* . . . shall . . . pay *to the distributor, for the benefit of the state, all taxes due* on diesel fuel . . . or may procure a distributor's license. . . . "). Again unlike the cigarette-tax scheme at issue in *Chemehuevi*, the Oklahoma fuel-tax scheme exempts the *distributor* from any obligation to remit to the state fuel taxes that are determined to be "uncollectable *by the distributor.*" *Id.* § 505(C) (Supp. 1993) (emphasis added). And since the distributor "collects" from the retailer, not the ultimate consumer, *id.*, the "uncollectability" provision (which, based on Respondent's research, is *at least* extraordinarily rare if not unique) also bears powerful witness to the fact that the tax in question is neither a wholesaler nor a consumer tax.

Still further highlighting the distinguishability of *Chemehuevi* (and the fact that the Oklahoma legislature knows how to impose consumer taxes *where it wants to*) are the similarity of Oklahoma's cigarette tax to the California tax at issue in *Chemehuevi* – and the *dissimilarity* of Oklahoma's cigarette and motor fuel taxes. Oklahoma's cigarette-tax scheme, for example, provides that there is "hereby levied upon the *sale, use, gift, possession, or consumption* of cigarettes within the State of Oklahoma a tax. . . . " OKLA. STAT. tit. 68, § 302 (Supp. 1993) (emphasis added). Oklahoma's fuel-tax scheme contains no similar language. Rather, Oklahoma law simply taxes the fuel when it is first sold by the distributor to the retail vendor. *Id.* § 502 *et seq.* (1991). Moreover, Oklahoma's cigarette-tax statutes make it a criminal offense for "*any person* to . . . have in his *possession* . . . cigarettes on which the tax . . . has not been paid." *Id.* § 306 (1991) (emphasis added). But there is no analogous provision in the state's motor fuel tax scheme. Rather, the latter scheme makes the wholesale distributor guilty of embezzlement if he

fails to pay over the taxes he collects, as the agent of the State, *from the retail vendor. Id.* §§ 505(C), 506(b) (1991 & Supp. 1993).

Apparently aware of the above (as was the Court of Appeals below), Petitioner attempts to avoid the obvious conclusion – that the tax is a retailer tax – by objections essentially of two types.

Petitioner's first category of argumentation is semantic. Tearing two clauses from the twenty-two page legislative scheme, Petitioner notes that OKLA. STAT. tit. 68, § 501(C) (Supp. 1993) states that "nothing . . . shall require a distributor, dealer *or retailer* to *collect*" the tax in certain circumstances, *id.* (emphasis added), and that *id.* § 509(a)[11] (Supp. 1993) exempts farmers from "paying" a portion of the tax. Petition at 20-21. It would undoubtedly have been more accurate from the perspective of the *totality* of the fuel-tax scheme to have made clear, as does, for example, OKLA. STAT. tit. 68, § 505(C) (Supp. 1993) (emphasis added) ("retailer or dealer . . . shall . . . *pay*"), that the distributor "collects" from the retailer, and that in light of that fact, distributors are exempted from any obligation to collect taxes *from retailers* where the ultimate purchaser is a farmer. Other states have framed their exemption and/or refund provisions with greater clarity. *See, e.g.*, MONT. CODE ANN. § 15-70-221(1) (1993) (emphasis added) (allowing certain refunds of "amount of tax paid *directly or indirectly* on the gasoline"). But as the Tenth Circuit (which has been interpreting Oklahoma statutes since shortly after statehood) was well aware, colloquialisms such as the above often occur in the state's statutory language, and among the things that *Chemehuevi* does not hold is that courts construing state taxation schemes must

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[11] Petitioner Tax Commission's citation to § 509(*b*), Petition at 21, was apparently an inadvertent attempt to invoke what is now § 501(a) after 1993 amendments to the Oklahoma fuel tax scheme. *See* 1993 Okla. Sess. Laws 667.

construe them as consumer taxes where two clauses in a twenty-two page statute create any ambiguity whatsoever. Rather, it simply requires courts to engage in "fair interpretation of the taxing statute," *Chemehuevi*, 474 U.S. at 11, and that is precisely what the Tenth Circuit, long familiar with Oklahoma law, did.

Petitioner's second category of argumentation focuses on the exemptions and refunds provided for in the Oklahoma fuel-tax scheme. Along this line, Petitioner invokes OKLA. STAT. tit. 68, §§ 509.2(A), 509.2(C),[12] 509.2(E), 509.2(F), and 527 (Supp. 1993), for the proposition that the exemptions established by those provisions demonstrate that the motor fuel tax scheme creates a consumer tax. Two defects are present in that line of argumentation.

First, the argument proves too much. Every fuel-tax scheme researched by Respondents, *see generally supra* at 5-6 n.5 (discussing schemes of largest Indian-country states), contains exemptions (or provides for refunds) of some type. *E.g.*, ARIZ. REV. STAT. ANN. § 28-1520 (West Supp. 1993); CAL. REV. & TAX. CODE ANN. § 7401 (West Supp. 1994); S.D. CODIFIED LAWS ANN. § 10-47A-46 (1989).

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[12] Petitioner also contends that the "fraudulent exemption-permit user" provision of OKLA. STAT. tit. 68, § 509.2(C) (Supp. 1993) renders Oklahoma's tax a consumer tax. Petition at 21. But the paragraph immediately preceding the paragraph Petitioner cites simultaneously provides that dealers placing diesel fuel in the tanks of such fraudulent permit users are *themselves* liable for payment of the tax. The second paragraph of § 509.2(C) no more converts the entirety of the fuel tax scheme into a consumer tax than the first paragraph of that provision conclusively establishes that the scheme is ipso facto a *retailer* tax. By Petitioner's reasoning, for example, S.D. CODIFIED LAWS ANN. § 10-47A-23 (1989), which imposes personal liability on the officers of corporations which have failed to pay applicable fuel taxes, would convert the South Dakota scheme into a tax on corporate officers.

Most likely, the fuel tax schemes of each of the fifty states so provides. Yet many of those states – as a matter of state law – characterize their own fuel-tax schemes as wholesaler, not consumer taxes. *See, e.g., supra* at 5-6 n.5. Clearly, among the numerous propositions that *Chemehuevi* does *not* support is that federal law recharacterizes such taxes as consumer taxes irrespective of a state's characterization of its own taxation scheme.

Second, Respondent notes that OKLA. STAT. tit. 68, §§ 509.2(A), 509.2(C), 509.2(E), 509.2(F), and 527 (Supp. 1993), all but the last of which were first enacted in 1993, do not replicate the colloquial drafting of *id.* §§ 501(C) and 509(a) discussed above. See *supra* at 19.

In sum, Petitioner's new argument that the legal incidence of the fuel tax is on consumers is as incorrect as the opposite argument it pursued for the three years before this case reached this Court, and the Court of Appeals, "fairly interpreting" Oklahoma's complex and lengthy scheme *as a whole*, correctly determined that its legal incidence is on fuel retailers.

4. *Federal law precludes the imposition of state taxes on Indian tribes regarding their activities within Indian country.*

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), this Court stated unequivocally:

> *In the special area of state taxation of Indian tribes* . . . we have adopted a *per se* rule. In *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985), we held that Montana could not tax the Tribe's royalty interests in oil and gas leases issued to non-Indian lessees. . . . We stated: "In keeping with its plenary authority over Indian affairs, *Congress can authorize the imposition of state taxes on Indian tribes* and individual Indians. It has not done so often, and *the Court consistently has held that it will find the Indians' exemption from state*

> *taxes lifted only when Congress has made its intention to do so unmistakably clear.*" . . . Accordingly, it is unnecessary to rebalance . . . interests in every case.

Id. at 215 n.17.

One proposition which is unmistakably clear as a consequence of the above is that *assertions of state taxation jurisdiction over the activities of Indian tribes in Indian country are tested by a standard of judicial review which is different* from the standard applicable to assertions of state *regulatory* jurisdiction in like circumstances. In the former case, a *per se* rule precludes state *taxation* of such activities absent congressional consent; in the latter, state *regulation* may be permissible (absent "normal" preemption) pursuant to the application of the "infringement" principle or the "preemption/balancing" test.

Petitioner, which devotes over half of the body of its Petition (excluding its Statement of the Case) to arguing the "preemption/balancing" test in the motor fuel tax context, see Petition at 8-20, is naturally unsatisfied with that result. Seizing on every instance known to Respondent wherein this Court – *in dictum* – substituted "presumption" for "*per se* rule," or added the word "generally" to its formulation, *e.g.*, Petition at 12, Petitioner then characterizes the *Cabazon Band* and *Blackfeet Tribe* formulations – and their underpinnings – as *dictum*. *See, e.g., id.* at 12 (*McClanahan* limited to lands or income); *id.* at 13-14 n.7 (*Cabazon Band* formulation as dictum). But Petitioner's crabbed construction of the *per se* rule, assuming that it acknowledges the existence of the rule at all, see Petition at 11, is undercut by recent precedent, the history of the rule, and the plenary role of Congress in Indian affairs.

First, Petitioner's most fundamental thrust – that the *per se* rule does not forbid taxing Indian tribes regarding their on-reservation activities, but rather precludes only property and income taxes – is unsupported by this

Court's recent precedent. To be sure, *McClanahan* was an income-tax case, and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), which encapsulated *McClanahan's* holding, consequently did so in terms more narrow than Respondent defends herein, *id.* at 148. But *Blackfeet Tribe*, which was decided twelve years after *McClanahan* and *Jones*, did not, 471 U.S. at 765, and *Cabazon Band*, decided still later, expressly endorsed and expanded the *Blackfeet Tribe* formulation, 480 U.S. at 215 n.17.

In the interim between *McClanahan* and *Cabazon Band*, this Court had decided *Bryan v. Itasca County*, 426 U.S. 373 (1976), *Moe*, *Colville*, *Chemehuevi*, and *Blackfeet Tribe*. Unlike *Jones*, which had confined itself to an exegesis of *McClanahan's holding*, *Bryan* reached back to the principles, policies, and precedents underlying that holding, *see* 426 U.S. at 376 n.2, and in so doing, rejected the limited construction of the *per se* rule now proffered by Petitioner, *see id.* at 375-76 (emphasis added) ("Principles defining the power of States to tax reservation Indians and their property *and activities* on . . . reservations. . . . "). Nor were *Moe* and *Colville* limited to property or income taxes: rather, those cases invalidated a wide range of other state taxes including vendor license fees, sales taxes, and cigarette taxes. *See supra* at 15 n.10 (discussing this Court's reasoning in *Moe*, *Colville*, and *Chemehuevi*, and the essentiality of identifying the legal incidence of the challenged taxes so as to be able to determine the applicability *vel non* of the *per se* rule). While *Colville* and *Chemehuevi* were decided subsequent to *Bryan*, the *Bryan* Court expressly noted the expansive consequences which had already flowed from *Moe*. *Bryan*, 426 U.S. at 377. Finally, the *Blackfeet Tribe* Court, in delving into the policies and precedents supporting and defining the scope of the *per se* rule, reached back much further into history. 471 U.S. at 765 (citing *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930)).

The passage which *Blackfeet Tribe* invoked from *Carpenter* leads directly to the expansive *per se* rule which this Court historically applied based on the now-superceded "federal instrumentality" doctrine. Manifestly, the "federal instrumentality" cases did not limit the *per se* rule to lands or income. *E.g., Howard v. Gipsy Oil Co.*, 247 U.S. 503 (1918) (mem.) (gross production tax); *Indian Territory Illuminating Oil Co. v. Oklahoma*, 240 U.S. 522 (1916) (tax on corporate stock); *Choctaw, Oklahoma & Gulf R.R. v. Harrison*, 235 U.S. 292 (1914) (occupation or privilege tax). Thus, both the historical and the more recent precedential context help to explain why *Petitioner has been unable to cite a single case in the more than two-hundred-year history of this Court in which it has tolerated a direct state tax* – of *any* type – *on an Indian tribe regarding its Indian-country activities absent congressional consent.*

Finally, the plenary role of Congress in Indian affairs – and this Court's longstanding recognition of that role – support the proposition that this Court should not overturn its century-old approach. No matter what formulation of the *per se* rule is adopted, both parties to this litigation apparently agree that *Congress* may abolish or make exceptions to that rule where and if it desires. Congress has been aware of the *Cabazon Band* formulation since 1987, aware of the *Blackfeet Tribe* formulation for a decade, aware of *Moe's* "incidence-of-the-tax" approach for almost two, and aware of the former consequences of the "federal instrumentality" doctrine since the nineteenth century. And as noted above, this Court has been unwilling to overrule its own caselaw in nonconstitutional matters where Congress has the capability of remedying any consequential problems which it perceives. *Supra* at 7 & n.6. That principle is carried to new heights in the instant case, wherein Petitioner further states that "it is indisputable" that an act of the *Oklahoma* legislature can *also* remedy any detrimental consequences which *it*

perceives, *without any help from this Court. See* Petition at 17.[13]

B. The Court of Appeals Correctly Determined that Relevant Treaties Preclude the Imposition of Oklahoma's Income Tax on the Income of Chickasaw Members Employed Directly by the Tribal Government Within Indian Country, Whether or Not Such Members Reside Within Indian Country.

1. *The Treaty of September 27, 1830, as confirmed by other relevant treaties and statutes, is still in force in relevant part as the supreme law of the land.*

Petitioner has silently acquiesced in the proposition that the relevant guarantees provided in the Treaty of September 27, 1830, 7 Stat. 333, are still in force as the supreme law of the land, and has confined its argumentation to the meaning of those guarantees. *See* Petition at 23-29.

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[13] The observation adduced in this paragraph also furnishes a response to Petitioner's contention that "'marketing' of the tax exemption by the tribes will take business from non-Indian retailers." Petition at 19; *see also id.* at 14-15 n.8. *Amicus curiae* Oklahoma Petroleum Marketers' Association may be expected to make a similar argument. But as has been called to this Court's attention earlier, Response to Application for Stay at 15-16 & Appendix A, *Chickasaw Nation* (No. A-227) (U.S. 1994), Respondent has itself enacted an equivalent fuel tax, and upon long and hard reflection cannot even imagine a *conceivable* motivation for other tribes not to do likewise. Moreover, should any of the other Oklahoma tribes not follow suit, even for counter-rational reasons, Congress, for the reasons described above, in balancing the competing policy interests, could remedy any problem which *it* perceives as such, *as could, by Petitioner's own argument, the Oklahoma legislature, without any help from this Court.*

2. *This Court has consistently held that applicable canons of construction require that treaties protecting tribal self-determination rights be construed in the manner most favorable to the tribe.*

E.g., County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 247 (1985) (citing cases); *McClanahan*, 411 U.S. at 173-74 (same).

3. *The Treaty of September 27, 1830 preempts state taxation of the income of* all *Chickasaw members employed directly by the tribal* government *within its Indian country.*

At the outset, the sole income tax (or treaty) question which this case presents to this Court must be stated with great precision: it is whether the 1830 treaty (as later reaffirmed by Congress) precludes state taxation of the income of member employees of the *government* of the Chickasaw Nation who perform their work within, but reside outside of Indian country. *Supra* at 2 & n.2, 9-11. The Court of Appeals held that it did. *Chickasaw Nation*, 31 F.3d at 975-79, *reprinted in* Petition at 24a-30a.

In relevant part, the 1830 treaty provides:

> The Government and people of the United States are hereby obliged to secure the said Choctaw Nation of Red People the jurisdiction and government of all persons and property that may be within their limits west,[14] so that no

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[14] Petitioner has attempted to employ this clause to limit the express and unequivocal guarantee which immediately follows. Petition at 26. But apart from the impact of the canons of construction on such argumentation, later cases have made clear that tribes possess sovereignty over both their territories and their members, *United States v. Wheeler*, 435 U.S. 313, 323

> Territory or State shall ever have a right to pass laws for the *government* of the Choctaw Nation of Red People and their descendants.

Treaty of Sept. 27, 1830, art. IV, 7 Stat. 333, 333-34 (emphasis added) [hereinafter "Treaty of Dancing Rabbit Creek"]. Petitioner recognizes the centrality of the term "government" in the above guarantee. *See* Petition at 25-26. Apart from the "canons of construction," *supra* at 26, and the dictionary definition of "government" (which includes both the *process* of governance and the *structure* through which governance is achieved, *see* WEBSTER'S UNABRIDGED DICTIONARY 789 (2d ed. 1983)), the historical origins of the guarantee evidence the breadth with which "government" should be construed.

Space does not permit the full replication of the argument concerning the historical context in which that guarantee was made, as presented to the Court of Appeals below. But encapsulated to the greatest possible degree, what were then known as the Five Civilized Tribes (the Choctaw, Chickasaw, Creek, Seminole, and Cherokee) "from time immemorial occupied the land that now comprises most of . . . the Southern States," GRANT FOREMAN, THE FIVE CIVILIZED TRIBES 17 (1934), and non-Indians wanted those vast lands. Some Choctaw members began to remove to the west early on, *e.g.*, *id.* at 22, and the Choctaw Nation was the first of the Five Tribes to enter into a comprehensive removal agreement. Given both the vast landholdings of the Five Tribes and the Choctaw leaders' willingness to negotiate removal in

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(1978), and this Court has held that it will not strain to implement Indian policies which Congress has now rejected, *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 527 (1986). Even as a wholly textual matter, the guarantee is provided to the tribal *government* wherever that government exercises jurisdiction, and in any event, all member employees at issue in this case performed their duties *within Chickasaw territory*.

advance of the other Five Tribes members, Congress provided the expansive guarantees contained in Article IV of the Treaty of Dancing Rabbit Creek. *Compare id. with* Petition at 28 (citing treaties with various smaller tribes, with lesser land bases, which, while containing limited guarantees precluding the application of state law to Indian *lands*, notably omit the markedly broader proscription of state laws affecting tribal *governments*) *and infra* at 28 n.15 (guarantees proved to Cherokee Nation).

Petitioner correctly recognizes that by subsequent treaty, Respondent Chickasaw Nation became a beneficiary of the Treaty of Dancing Rabbit Creek, Petition at 7 n.2, and Respondent agrees with Petitioner that the Creek and Seminole Nation treaties, see Petition at 28, are indistinguishable in material respect. Thus, four[15] of the Five Tribes share this exceptionally broad and rare, *supra* at 8-9, guarantee.

All nonresident member employees as to which the Court of Appeals found the income tax non-opposable are employed directly by the tribal *government*. To be sure, while many are employed in what might be characterized as the performance of "traditional" governmental functions, *but cf. Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 538-45 (1985) (finding that the "governmental/proprietary" distinction could not be satisfactorily drawn), others are employed in tribal enterprises. But they are all directly employed *by their*

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[15] The Cherokee Nation, the other member of the Five Tribes, entered into its removal treaty substantially later, *see* GRANT FOREMAN, INDIAN REMOVAL 229-312 (2d ed. 1953); *see generally Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and was not provided with as sweeping a guarantee as that included in the Treaty of Dancing Rabbit Creek. *Compare id.*, art. IV *with* Treaty of Dec. 29, 1835, art. V, 7 Stat. 478, 481 (guarantees provided to Cherokee Nation).

government, and in light of the historic congressional policy strongly promoting not only tribal self-determination but also self-*sufficiency*, *see, e.g., Cabazon Band*, 480 U.S. 216-17 & nn.19-20 (citing statutes and Presidential statements), Respondent respectfully urges this Court to recognize that while neither the federal government nor states regularly engage in entrepreneurial activities, *that is precisely what Congress and the President have urged Indian tribes to do.* The functions of tribal "governments," in short, are different from those of the federal and state governments. Moreover, since this Court has been unable to draw a bright-line "governmental/proprietary" distinction well into the twentieth century, *Garcia*, 469 U.S. at 538-45, it cannot be assumed that the Indian signatories to the Treaty of Dancing Rabbit Creek – *all of whom signed that document by making an "x," see* 7 Stat. 333, 342 (1830) – would have understood "government" in the constricted sense proffered by Petitioner, see Petition at 25-27, one hundred and sixty-four years ago.

As is the case with respect to the historical context, space does not permit the replication of Respondent's interpretive argument to the Court of Appeals in full. Its crux, however, is this. Respondent has treaty guarantees (which Petitioner admits are in force) precluding Oklahoma from passing laws for its "government." Excluding like guarantees provided to the Choctaw, Creek, and Seminole Nations, such guarantees go far beyond those provided by the United States to virtually all if not all other Indian tribes. Imposing the state's income tax on employees *of that government* increases the costs to and reduces the efficiency and efficacy of the Chickasaw *government*. The Court of Appeals consequently correctly determined that the tax is non-opposable to all member employees of that government, resident or nonresident, where the duties of such employees are performed for the tribal government in Indian country.

CONCLUSION

For these reasons, Respondent Chickasaw Nation respectfully requests this Court to deny the Writ herein.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent asserts that this case involves nothing more than narrow issues of state law and treaty interpretation. But the Tribe is able to make this argument only by disregarding the first and principal issue presented in the petition: whether *federal* law precludes state taxation of sales by Indians to non-Indians that impose substantial burdens on the State. Respondent plainly is wrong in contending (Br. in Opp. 7) that the resolution of this question is in any sense dependent on "review of the factbound incidence-of-the-fuel tax question" (as the Tribe characterizes the petition's *second* question); to the contrary, the first question presented in the petition *assumes* that the legal incidence of the fuel tax falls on the *Indian retailer*. The question whether such a tax may be validly imposed is of great importance to States, to Indian tribes, and (as the *amicus* brief filed by the Petroleum Marketers

Association of America ("PMAA") demonstrates) to the business competitors of Indians across the nation. Indeed, the contention that this case lacks significance is belied by the extraordinary filing of two *amicus* brief *opposing* certiorari, which suggests that those belittling the importance of the holding below protest entirely too much.

Respondent *acknowledges* that the decision below holds the validity of a state tax to turn entirely on the levy's nomenclature. The Tribe does not deny (or, for that matter, make any response at all to) our submission that such a holding is flatly inconsistent with this Court's decisions. And respondent does not take issue with our observation that the court of appeals' decision will foment litigation, disrupt state tax administration, and lead to substantial drains on state revenues. Because that holding imposes extraordinary restrictions on state taxing authority, provides tribes with a blueprint for obtaining tax exemptions for their commercial activity, and departs from decisions of this Court, further review is warranted.

A. An Otherwise Permissible Tax is Not Rendered Invalid Simply Because Its Legal Incidence Falls on an Indian Tribe

1. Given respondent's myopic focus on state law, the undisputed nature of the *federal* holding below bears emphasis. As we explain in the petition (at 8, 13) and as respondent evidently recognizes, the economic burden of the fuel tax falls on purchasers who are *non-Indians* or *non-members* of the Tribe; the State undeniably could impose the tax directly upon those purchasers and could require the Tribe to collect the levy; the fuel is used in large measure outside of Indian country; and the tax is used to defray costs that are imposed upon the State — and *not* upon respondent — by the use of that fuel. Respondent takes issue with *none* of this.[1] The court below nevertheless invalidated the tax for the sole

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[1] Pointing to the use of federal funds to construct roads in Indian country, *amici* Muscogee (Creek) Nation (at Br. 12-13) and Cherokee Nation (at Br. 8-9) — but not respondent — challenge our statement of the issue. In fact, the record in this case reflects, as the district court found and as respondent does *not* deny, that "*the Tribe* does not construct or

reason that the legal incidence of the levy falls upon the Tribe. Respondent (in the brief portion of its submission directed to the first question presented in the petition) defends that holding as a proper application of "a *per se* rule forbidding direct state taxation of Indian tribes regarding their Indian country activities." Br. in Opp. 7, 24. But that argument cannot be reconciled with this Court's decisions.

2. At the outset, we note that respondent is simply incorrect in contending (Br. in Opp. 24) that the Court has never tolerated a direct state tax on an Indian tribe. As we explained in the petition (at 13), the Court has expressly declared the rule against state taxation of tribes inapplicable in the *very* situation presented here, explaining that its holdings invalidating state levies on Indian income did not address claims "that the State could not tax that portion of the receipts attributable to on-reservation sales to non-Indians." *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 482 (1976).[2] We also explained in the petition (at 15-

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maintain roads and highways for the use of the general public in Oklahoma." Pet. App. 37a (emphasis added). The district court also found, and respondent again does *not* dispute, that the fuel subject to tax, which is sold in stores catering to the general public, "is used almost exclusively off of Indian country *on state jurisdiction roads*." *Id.* at 36a (emphasis added). It therefore is inarguable that the sale and use of the fuel imposes substantial burdens on the State, and no burden at all on the Tribe. This conclusion is not significantly changed even if the federal expenditures are viewed as relevant. *Amicus* Cherokee Nation reports (at Br. 8) that the Federal Government has allotted less than $18 million to Indian reservation road construction in Oklahoma in 1994. In contrast, the state fuel tax produces more than $300 million annually, at least 90% of which is devoted to road construction and maintenance. See Pet. 2-3. The relative extent of the burden imposed upon the State is manifest.

[2] As we explained in the petition (at 13 n.6), the Court in *Moe* was referring specifically to *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685 (1965), where an on-reservation Indian trader — who bore the legal incidence of the tax — failed even to challenge the portion of a gross income tax falling on the proceeds of sales to non-Indians. And as respondent itself acknowledges (Br. in Opp. 15 n.10), "'Indian trader' cases * * * furnish analogous precedent" for cases

16) that the Court has held the rationale of the rule barring direct state taxation of tribes to have no application where, as here, the tax falls upon activities that have "a significant impact beyond the limits of" Indian country. *Rice* v. *Rehner*, 463 U.S. 713, 724 (1983). In doing so, the Court has expressly distinguished the very cases relied upon by respondent, explaining that such "'spillover' effect[s] [are] qualitatively different from any 'spillover' effect of income taxes or taxes on cigarettes." *Ibid.* (citation omitted). Respondent — which cannot contest the significant "spillover" effect of its fuel sales (see Pet. 15) — does *not* deny the relevance of, and makes *no* attempt to explain away, this authority.

Respondent also is wrong in asserting that our submission asks the Court to revisit prior holdings (see Br. in Opp. 7) or would limit the preemption of state taxes to those on Indian property or income. *Id.* at 22. To the contrary, we recognized in the petition (at 11-12 & n.5) that the Court repeatedly has invalidated a range of state taxes whose legal and economic incidence fell on tribal activities taking place in Indian country — taxes that necessarily interfered with the mechanisms of tribal self-government. But as we explained in the petition (and as respondent rather elliptically acknowledges, see Br. in Opp. 22), the Court consistently has stated this rule *not* as an absolute, but rather as a *presumption* under which Indian tribes *generally* are immune from state taxation. See Pet. 12 (quoting *Oklahoma Tax Comm'n* v. *Sac and Fox Nation*, 113 S. Ct. 1988 (1993); *Montana* v. *Blackfeet Tribe*, 471 U.S. 759 (1985); *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980); *Duro* v. *Reina*, 495 U.S. 676 (1990); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973)). Respondent's argument to the contrary rests entirely on *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202 (1985), where the Court alluded in a footnote to "a *per se* rule" making it "unnecessary to rebalance these [state and tribal] interests in every case." *Id.* at 215 n.17. As we explained in the petition (at 13), however — and as respondent again does not deny — *Cabazon Band* did not involve state taxation at all, did not address the issue

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involving taxes on Indians.

presented here, and therefore cannot fairly be read as requiring preemption in the circumstances of this case.[3]

In fact, respondent fails to offer any support at all for its proposed rule. We explained in the petition (at 13) that the Court *never* has invalidated a state tax in the circumstances of this case, where the economic burden of the levy falls on non-Indian purchasers who could themselves be subjected to tax, and when the levy "is directed at off-reservation value where the taxpayer is receiving State services" (Pet. App. 37a); respondent does *not* take issue with that proposition. In this setting, respondent plainly is wrong in asserting (Br. in Opp. 7, 24) that congressional silence somehow represents an endorsement of its position. And respondent offers no rationale for invalidating a tax that — unlike those that have been struck down by the Court (see Pet. 12, 14-15) — does not remotely interfere with the mechanisms of tribal government.

3. For a variety of reasons, respondent also is wrong in asserting that the decision below lacks significance because the Oklahoma legislature could save the challenged tax with "a stroke of the pen" by declaring its legal incidence to be on the consumer. Br. in Opp. 7; *id.* at 24-25. *First*, this argument expressly recognizes that the holding below turns entirely on a semantic formalism. But as we explained in the petition (at 17-18) — and as respondent pointedly does *not* deny — this Court repeatedly has held that state tax laws *cannot* be invalidated on semantic grounds that have "no relationship to economic realities." *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). The Court in *Complete Auto* therefore rejected precisely the argument now advanced by respondent, holding that the possibility of saving a tax by changing its name does not justify "a focus on formalism that merely obscures the question whether the tax produces a forbidden

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[3] The conclusion that state and tribal interests need not be rebalanced "in every case" hardly means that *all* state taxes falling on tribes are invalid in *all* circumstances. That there is no need to balance interests when a personal income tax falls on a reservation Indian's income from reservation sources, for example, does not suggest that balancing is inapplicable in the very different circumstances of this case.

effect." *Id.* at 288. Respondent offers absolutely no response to this authority.

Second, the holding below is of great practical significance even if the State may save the tax prospectively by (for example) declaring it to fall on the consumer's "privilege" of using motor fuel. We explain in the petition (at 17-18) — and respondent again does *not* deny — that in such circumstances Indian sovereign immunity would preclude the collection of forgone tax revenue. Moreover, as *amicus* PMAA demonstrates (at Br. 4-5), changing the legal incidence of the tax would not solve the State's problem, because tribes could chase the tax exemption up the distribution chain by the simple expedient of becoming distributors (or even, if need be, refiners).

This prospect of manipulation also belies respondent's argument (Br. in Opp. 5-6 & n.5) that the question here is unimportant because other state fuel tax statutes are not identical to Oklahoma's. Some of the tax statutes cited by respondent place the legal incidence on the distributor; in those jurisdictions, the decision below gives tribes a blueprint for obtaining tax immunity by chasing the legal incidence. In others, as in Oklahoma, the statutes simply indicate who is to pay the tax to the State without expressly declaring the legal incidence (in Oklahoma, of course, the statute requires remittance of tax by the distributor, not the retailer); in those jurisdictions, the statutory ambiguities will foment litigation. In all jurisdictions, then, the rule announced below will be significant and destructive.

Third, the importance of the exemption granted respondent is vastly compounded by the virtual certainty that Oklahoma's tribes (and those in other States that follow respondent's lead) will market their tax exemptions by undercutting non-Indian retailers. Respondent declares that it "cannot even imagine a *conceivable* motivation" for tribes not to enact their own fuel taxes in amounts equivalent to Oklahoma's. Br. in Opp. 25 n.13 (emphasis in original). In fact, however, this Court's experience (in *Dept. of Taxation and Finance* v. *Milhelm Attea & Bros.*, 114 S. Ct. 2028 (1994), *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), and *Moe*, among other cases) makes clear that tribes *invariably* market their tax exemptions, for

a perfectly logical and legitimate reason: doing so maximizes revenue. And as PMAA demonstrates (at Br. 11-12), such a development would play havoc with the intensely competitive fuel markets in Oklahoma and other states. It also would vastly diminish state tax revenue. For all of these reasons, review of the decision below is imperative.

B. The Incidence of Oklahoma's Fuel Tax Falls on the Consumer

The Tribe's contention that review is not warranted to determine where the legal incidence of the fuel tax falls is directed largely at a straw man.[4] We do not contend, as respondent suggests (Br. in Opp. 13-15), that *California State Board of Equalization* v. *Chemehuevi Indian Tribe*, 474 U.S. 9 (1985), stated an absolute rule placing the legal incidence of every state transaction tax on the ultimate consumer. But that decision *does* stand for the proposition that the Court will intervene when a court of appeals manifestly misinterprets a significant state tax law in a manner that renders it invalid. That is the case here.

We demonstrated in the petition (at 20-22) that a definitional provision of Oklahoma law refers to the collection of taxes by a distributor or *retailer*, indicating that both collect the tax from someone further down the distribution chain. Another provision declares that consumers using fuel for agricultural purposes may purchase it "without paying the tax," again indicating that it is the consumer who ordinarily is expected to pay the tax. The Tribe's response to these points is telling. It does not contest our interpretation of these provisions; instead, it dismisses the statutory language as "colloquialisms" that do not "accurate[ly]" state the

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[4] The Tribe is wrong in contending (Br. in Opp. 16) that petitioner previously has stated the legal incidence of the tax to fall upon the distributor. Petitioner certainly did inform the court of appeals — as the statute expressly provides — that "motor fuel distributors are required to report and remit the tax on fuel sold to retailers." CA Br. 10. But petitioner immediately went on to add that "[t]he retailer's wholesale price will include the motor fuel taxes which are in turn included in the retail price at the pump." *Ibid.* Petitioner has *never* suggested that the wholesaler bears the legal incidence of the fuel tax.

meaning of the levy. Br. in Opp. 19. We take this extraordinary contention — that the statutory text should be ignored because it is not "accurate" — as an implicit concession that the holding below cannot be squared with the plain terms of the statute.

Respondent's other contentions take it no further. Thus, the Tribe maintains (Br. in Opp. 20-21) that the existence of exemptions to the tax does not establish the levy as one on consumers. But the important point, of course, is that the particular exemptions available in Oklahoma turn on the *consumer's* use of the fuel — and that the obligation to pay the tax is placed upon a *consumer* who uses the fuel in a manner inconsistent with the exemptions. Respondent makes no attempt to explain away these provisions. Instead, respondent relies (Br. in Opp. 17-18) upon elements of the statute indicating that distributors remit the tax on behalf of retailers and relieving distributors of the obligation to remit uncollectible taxes.[5] As we explained in the petition, however (at 20), these provisions demonstrate only that distributors do not pay the tax on their own behalf; they say nothing about who further down the distribution chain is intended to bear the ultimate legal incidence of the levy. Respondent therefore has failed to refute our submission that the court of appeals plainly erred in its placement of the fuel tax's legal incidence, and therefore in its invalidation of a significant state tax as it applies to a large category of taxpayers.

C. Oklahoma's Income Tax May be Applied to Tribal Members Who Live Outside of Indian Country

We agree with respondent that the court of appeals, in holding Oklahoma's income tax invalid as applied to tribal members who earn income on trust land but who live outside of Indian country, purported to rely on the federal treaty with the Chickasaw Nation

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[5] Respondent also observes (Br. in Opp. 18) that the statute does not in terms tax the use, gift, possession, or consumption of fuel and does not place a payment obligation on persons possessing untaxed fuel. But in contrast to cigarette stamp taxes, which are respondent's point of reference, there is an obvious enforceability problem in determining whether a particular gallon of gasoline in an automobile's fuel tank has been taxed. Cf. *Milhelm Attea*, 114 S. Ct. at 2031.

rather than on more general principles of federal law. But respondent plainly misstates the meaning of the court's holding regarding that treaty. Focusing on language providing that no State "shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants," respondent suggests that the court read the treaty to proscribe state laws that regulate the *tribal government*. See Br. in Opp. 9, 27-29. Respondent therefore reports that the court invalidated the tax because, as applied to employees of the tribal government, it "increase[d] the costs to and reduce[d] the efficiency and efficacy of the Chickasaw *government*." *Id.* at 29 (emphasis in original). The Tribe adds that "the only circumstance in which the guarantee that no state shall pass laws for tribal *governments* * * * becomes relevant in the context of state taxation * * * is with respect to member employees of those *governments* who reside outside of Indian country." *Id.* at 9 (emphasis in original).

It is plain from the face of the court of appeals' opinion, however, that the court held nothing of the sort. Instead, it read the treaty to proscribe state laws that *govern* individual members of the Chickasaw Nation. It held: "the Chickasaw treaty explicitly provides that no state would ever be permitted to pass laws for the government of the Chickasaw or their descendants. The crucial question in determining the validity of the income tax under the relevant treaty language is therefore whether the law is one *imposed on the Chickasaw Nation or its descendants*." Pet. App. 30 (emphasis added). See *id.* at 21a ("on its face, the treaty language prohibits the states only from passing laws governing the Tribe and its descendants, not non-members"). The question posed by the court therefore was, not whether the tax fell upon the tribal government, but whether it fell upon individual Chickasaws.[6]

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[6] This is quite clear from the court's analysis. If the court had reasoned that state law is preempted because "[i]mposing the state's income tax on employees of [the tribal] government increases the costs to and reduces the efficiency and efficacy of the Chickasaw government" (Br. in Opp. 29 (emphasis deleted)), it would have held that the tax could not be imposed on non-member employees of the tribal government; in fact, the court held the tax *valid* as applied to such employees. Pet. App. 21a-22a. Indeed, the court of appeals expressly rejected respondent's

Respondent's interest in mischaracterizing the scope of the decision below is understandable. As we explained in the petition (at 27, 28-29), the court of appeals' actual holding is extraordinarily broad: if correct, it seemingly would preclude the application of *any* state law to *any* Chickasaw. And the importance of that decision transcends the controversy between the parties here. Respondent itself acknowledges (Br. in Opp. 28) that identical language appears in treaties with three other tribes (the Chocktaw, Creek, and Seminole). We noted in the petition (at 28) that very similar language recurs in many additional treaties across the nation. Review of the decision below therefore plainly is in order.

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 1994

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understanding of the treaty, holding that "[s]ince the income tax is not a tax on the source of the income, it does not impose any burden on the tribal government." *Id.* at 22a.

Supreme Court, U.S.
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(3)

No. 94-771

In The

Supreme Court of the United States

October Term, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF AMICUS CURIAE CHEROKEE NATION IN SUPPORT OF RESPONDENT

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No. 94-771

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICUS CURIAE CHEROKEE NATION IN SUPPORT OF RESPONDENT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Amicus Curiae, Cherokee Nation, prays that the Petition of the Oklahoma Tax Commission for a Writ of Certiorari for review of the judgment of the Tenth Circuit Court of Appeals, entered in this case on July 29, 1994, be denied.

THE INTEREST OF THE AMICUS CURIAE CHEROKEE NATION

The Cherokee Nation submits this brief, with accompanying consents of the parties, as Amicus Curiae under U.S. Sup. Ct. Rule 36. The Cherokee Nation limits its submission to arguments in support of the Tenth Circuit's decision concerning the Oklahoma state fuel tax.[1]

The Cherokee Nation has an interest in this action insofar as it concerns the state fuel tax issue for several reasons. First, the Cherokee Nation shares a similar legal history with the Chickasaw Nation, being one of the five federally recognized tribes formerly referred to as the "Five Civilized Tribes." It accordingly has a strong interest in participating in any major decision which could subsequently directly or indirectly affect interpretation of the legal status of these tribes arising from their common history.

Second, the Cherokee Nation functions as a strong governmental entity for a significantly large membership, consisting of 163,740 members, 116,854 of whom reside in Oklahoma. Its exercise of governmental powers includes maintenance of a Tax Commission and the recent establishment of a Roads and Transportation Program. The

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[1] The Cherokee Nation does not address the Tenth Circuit's interpretation of this Court's decision in *Oklahoma Tax Commission v. Sac and Fox Nation*, 113 S. Ct. 1988 (1993), as allowing a state income tax exemption to tribally employed members who do not reside in Indian country, since the Tenth Circuit decision is based on special provisions in treaties of only a very few tribes in the United States and therefore obviously warrants no Supreme Court review on a petition for certiorari.

Cherokee Nation has an interest in protecting its ability to fully exercise these important governmental functions.

Third the Cherokee Nation has jurisdiction over approximately 61,300 acres of tribal trust property and 56,000 acres of restricted property in northeastern Oklahoma. Although the Cherokee Nation does not presently operate any gas retail business, it has an interest in protecting its ability to establish such a business at a future date, not only for economic development purposes, but also to establish a source of revenue from a tribal tax on gasoline purchases by the Cherokee Nation. A portion of this tribal revenue may be made available for construction and maintenance of roads in the Cherokee Nation's jurisdictional area to assist rural Indians and non-Indians whose needs are not currently adequately met by the state or county roads systems.

SUMMARY OF ARGUMENT

Amicus Curiae Cherokee Nation's argument in opposition to the Oklahoma Tax Commission's Petition for Certiorari is simple. The Tax Commission's claims that the Tenth Circuit decision is confusing and burdensome on the states are unfounded and irrelevant to a decision whether United States Supreme Court review is needed in this action. The Tenth Circuit held that the legal incidence of the challenged state fuel tax falls on the tribe and that state taxation of the tribe is preempted absent express Congressional authorization. This holding is consistent with the United States Supreme Court's decisions establishing basic principles governing federal, tribal and

state authority in Indian country. Supreme Court review is not warranted in this case.

ARGUMENT

The Oklahoma Tax Commission has not demonstrated the existence of any "special and important reasons" for Supreme Court review of the Tenth Circuit decision. It has not and cannot show that the decision is in conflict with the decision of another federal appeals court on the same matter or that it has decided a federal question in conflict with a state court of last resort. See U. S. Sup. Ct. Rule 17. The Tax Commission also has not established that this case meets any other standard for determining whether a case should be reviewed on certiorari, failing to show that the decision has "so far departed from the accepted and usual course of judicial proceedings" as to justify "an exercise of this Court's power of supervision." See U.S. Sup. Ct. Rule 17.1(a).

The Tax Commission argues that certiorari should be granted based on its assertion that the Tenth Circuit decision imposes "a significant burden on the States" by diminishing state power to raise revenue for construction and maintenance of state roads outside of Indian country, which are used by both Indians and non-Indians, and based on its assertion that the decision sows "considerable confusion" in a complex area of the law. Pet. at 2, 8. The Tax Commission also argues that the rule against direct taxation of a tribe's reservation activities established in *McClanahan v. Arizona Tax Commission*, 416 U.S.

164 (1973), has never been stated in absolute terms, Pet. at 9, asserting that:

> . . . this rule has never been applied to invalidate a state tax in the circumstances here: where the economic burden of the tax falls . . . on purchasers who are non-Indians or non-members of the Tribe; where the State undeniably could impose the tax directly on those purchasers – and could . . . require the Tribe to collect and remit the tax; and where use of the product sold generates costs that are imposed entirely upon the State.

The Tax Commission claims that the Tenth Circuit decision departs from "this Court's precedents in the placement of the legal incidence of the challenged tax," Pet. at 8, without providing any convincing legal documentation. The Tax Commission does not present any contrary caselaw directly in point, relying instead on loose interpretations of dictum in other cases with regard to the ability of states to impose taxes on non-Indian consumers purchasing goods in Indian country. Pet. at 13, citing *Moe v. Confederated Salish and Kootenai Tribes,* 425 U.S. 463, 482 (1976) and *Confederated Tribes of the Colville Indian Reservation v. State of Washington,* 447 U. S. 134, 178.

The Tax Commission's statements concerning the "nature of the fuel tax," Pet. at 8 and 9, are also legally and factually inaccurate. The Tenth Circuit's evaluation of the tax as a tax on the tribe, rather than a sales tax on the consumer, is based on a comprehensive review of all provisions of the state's fuel tax laws, including provisions requiring distributors to remit the taxes and provisions stating that remittances are made "on behalf of a

licensed retailer." Cf. Okla. Stat. Ann. Tit. 68, § 502 (Supp. 1993). As stated by the Tenth Circuit, citing *White Mountain Apache v. Bracker,* 448 U.S. 136, 151, n. 15 (1980), and *Memphis Bank & Trust Co. v. Garner,* 459 U.S. 392, 397 (1983): "The question of who bears the ultimate economic burden of the tax is distinct from the question of on whom the tax has been imposed." *Oklahoma Tax Commission v. Chickasaw Nation,* 31 F.3d 964 (10th Cir. 1994) Resp. Brf. Appendix A at 14a.

Since the Oklahoma fuel tax is clearly a tax on the retailer tribe in the instant case, the Tax Commission attempts to confuse the issues by playing for this Court's sympathy in its characterization of the "nature" of the tax. The Tax Commission states that "perhaps most significant," the state fuel tax revenues are used to defray costs of road construction and maintenance "imposed upon the *State* – and *only* upon the State" by the use of the fuel.

The Tenth Circuit correctly found any consideration regarding use of the tax irrelevant in its evaluation of the nature of the tax as follows:

> . . . Here, the proceeds of the fuel tax go almost exclusively to the building and maintaining of highways in the state of Oklahoma, both within Indian country and without. This fact does not alter the nature of the fuel taxes as simple revenue measures. Because they are directed toward funding traditional government activities, the taxes fall within the ambit of the sovereignty of the tribal government. Accordingly, the district court erred in concluding that imposition of the fuel tax on the tribal retailer was not preempted by federal law. Where the state action conflicts

> with a power within the traditional scope of Indian sovereign authority, preemption is presumed in the absence of an explicit statement of congressional intent to the contrary. *Rice*, 463 U. S. at 719-20. The state has directed our attention to no such explicit grant of congressional approval of the taxation scheme here at issue and we know of none.

Oklahoma Tax Commission v. Chickasaw Nation, 31 F.3d 964 (10th Cir. 1994), Resp. Brf. App. at 16a.

Based on the above reasoning, the Tenth Circuit correctly found that a "balancing of the respective tribal and state interests at stake is not relevant to a determination of the propriety of the fuel taxes." *Oklahoma Tax Commission v. Chickasaw Nation*, 31 F.3d 964 (10th Cir. 1994), Resp. Brf. App. A at 16a.[2] Although this finding is well grounded in basic Indian law principles set out in cases

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[2] Although the Tenth Circuit refers to a "presumption" of tax exemption for Indian tribes, the rule could be more accurately characterized as a "per se" rule, in light of statements by this Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, n. 17 (1987) that: "In the special area of state taxation of Indian tribes . . . we have adopted a per se rule . . . and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear . . . " It should be stressed here that state taxation is not the same thing as state regulation. See *Bryan v. Itasca County*, 426 U.S. 373 (1976) (holding that the applicability of a Public Law 280 state's civil laws in Indian country by virtue of Public Law 280 did not result in express Congressional consent to tax on reservation activities). Under the per se rule, state taxation is not permissible absent Congressional consent, while state regulation may be allowed when state and tribal interests are balanced under the infringement test.

such as *McClanahan v. Arizona Tax Commission*, 416 U.S. 164 (1976), *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985) and *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), Amicus Curiae Cherokee Nation believes it is important to nevertheless inform this Court that the Tax Commission has incorrectly stated that it bears the full economic burden of the use of roads by consumers of gasoline sold by an Indian tribe. In the 1994 fiscal year, more than $ 17.5 million in federal Indian Reservation Roads funds were allocated to the Bureau of Indian Affairs and/or Indian nations in Oklahoma for roads projects pursuant to 23 U.S.C. 202(d).[3] The Indian Reservation Roads funding supplements federal funding which the state receives for highway construction and maintenance. 23 U.S.C. § 204(c).[4] This funding is used for public

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[3] The Cherokee Nation alone had federal Indian Reservation Roads funding in the amount of more than $ 4 million for its 1994 fiscal year for its roads program, administered by its Transportation and Roads Program as authorized by a compact between the Nation and the federal government. "Addendum to FY 1994 Annual Funding Agreement Between Cherokee Nation and the United States (Department of Interior)" executed pursuant to the Indian Self-Determination Act, 25 U.S.C. 450f. Prior to the administration of this funding by the Nation, federal roads funding for the fourteen county area within the geographic boundaries of the Cherokee Nation was administered by the Bureau of Indian Affairs. Indian Reservation Roads funding benefits both Indians and non-Indians. On a national scale, the Federal Highway Administration had $ 191 million allocated for the Indian Reservation Roads Program in FY 1994.

[4] The Federal Highway Administration approves projects for federally funded secondary road systems proposed by state departments of transportation. Federal taxes pay a large percentage of the costs of construction, and local government pays the remaining costs. In states with substantial amounts of

roads located within or leading to Indian country or an Indian community, traveled by non-Indians and Indians alike.[5] Even in areas of high Indian populations, the population in any given geographic area in Oklahoma is still predominantly non-Indian.

In summary, the state's reliance on the "burden" of the Tenth Circuit's decision as a reason for this Court's review of the case is outside the scope of the preemption principles governing this action. The Oklahoma fuel tax is a direct tax on the tribal retailer which is preempted by federal law. It is directed toward funding traditional government activities which fall within the ambit of the sovereignty of the tribal government. Several tribal governments in Oklahoma, including the Cherokee Nation,

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Indian and/or federal land, the federal share is greater and the local share is smaller. In Oklahoma, the federal share in 1986 was almost seventy-six percent. See "Report to Bureau of Indian Affairs, BIA Transportation Study, State of Oklahoma," Report Summary, General Report Vol. GR-I at IV-7, Presnell Associates, Inc., September 1986.

[5] In contrast, a 1986 report included findings that the state and counties constructed and maintained roads with federal funds in a significantly smaller percentage of those Oklahoma counties with a greater Indian population, compared to road construction and maintenance in those Oklahoma counties with smaller Indian populations. The report questioned the disparity and suggested the possibility of discrimination by the state against Indians in use of the federal funds. See "Report to Bureau of Indian Affairs: BIA Transportation Study, State of Oklahoma," Report Summary, General Report, Vol. GR-I at IV-19 and IV-22, Presnell Associates, Inc., September 1986.

have recognized this fact by pursuing enactment of tribal fuel tax legislation.[6]

CONCLUSION

The Oklahoma Tax Commission has failed to present sufficient grounds for issuance of a writ of certiorari. The Tenth Circuit decision did not resolve any substantial federal question. Rather it represents a narrow holding that, under the State of Oklahoma's current statutory scheme, the Chickasaw Nation is not subject to payment of the state tax on gasoline purchased by the tribe for retail sales in Indian country. In view of the lack of precedential effect of this case on Indian tribes outside of Oklahoma and in view of the consistency of the opinion with the decisions of this Court setting forth principles concerning state taxation in Indian country, Amicus

[6] The Chickasaw Nation, Choctaw Nation and Seminole Nation have each adopted tribal laws which impose tribal taxes replacing the state fuel tax. Chickasaw Nation Law 11-011 (August 11, 1994), Choctaw Nation Bill 163-94 (August 13, 1994) and Seminole Law 94-13 (September 3, 1994). The Council of the Cherokee Nation currently has such legislation before it for consideration for passage in December of 1994.

Curiae Cherokee Nation requests the Court to deny the Petition for Certiorari.

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No. 94-771

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

OKLAHOMA TAX COMMISSION,

Petitioner

v.

CHICKASAW NATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR *AMICUS CURIAE* THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Petroleum Marketers Association of America (PMAA) respectfully submits this brief *amicus curiae* in support of the petition for writ of certiorari filed by the Oklahoma Tax Commission in this case. Written consent to the filing of this brief has been obtained from all parties. The original letters authorizing consent have been filed concurrently herewith.

INTEREST OF AMICUS CURIAE

The PMAA is a federation of 43 state and regional trade associations representing over ten thousand small business petroleum marketers.1/ Together, PMAA members market approximately 50 percent of the gasoline and 75 percent of the home heating oil sold in America. In addition, they supply over one-half of the Nation's retail motor fuel facilities,2/ approximately three-quarters of which are operated by independent retailers. PMAA members are comprised primarily of jobbers and other wholesale distributors of refined petroleum products as well as chain retailers that market motor fuels through service station outlets.

The PMAA's interest in this case is direct and substantial. At issue is a decision of the Tenth Circuit Court of Appeals3/ that impacts on the ability of petroleum marketers to compete with Tribal retailers that sell motor fuel to non-members for use almost exclusively on state roads outside of Indian country, and who enjoy a significant competitive advantage that stems from an exemption from the payment of motor fuel taxes. In an industry

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1/ A list of the constituent state and regional trade associations that comprise the PMAA is set forth in the Appendix hereto.

2/ Independent marketers own or lease over 49,800 retail facilities nationwide and store fuel at over 10,000 additional "bulk plants." PMAA's 1993 member survey discloses that its members supplied 76,608 of America's approximately 150,000 retail motor fuel distribution outlets (e.g. gasoline stations, truck stops, convenience stores etc.). Their 280,000 full-time employees serviced this network with roughly 100,000 vehicles and they bear the credit costs and risks of approximately $13 billion in credit card sales that they and their dealers make to the American motoring public annually.

3/ The opinion of the court of appeals is reported at 31 F.3d 964. Judgment was entered by the court of appeals on July 29, 1994.

characterized by intense price rivalry, and with average *combined* wholesale and retail margins running in the neighborhood of fourteen cents per gallon,4/ a cost advantage to Indian retailers of anything approaching the per gallon amount of the excise tax ($0.17 per gallon) would severely disrupt motor fuel markets in the State of Oklahoma and would eliminate competition entirely.

Moreover, the interest of PMAA members is directly related to and aligned with the interest of the State of Oklahoma. To the extent that tax-exempt Tribal enterprises gain market share at the expense of existing marketers, the ability of the State to raise revenue through motor fuel excise taxes would be severely diminished. In the same vein, to the extent that the Tenth Circuit's decision is established as the guiding principle for determining the tax-exempt status of Tribal enterprises, the decision would have far-reaching implications for the Nation's petroleum marketing industry and the other federal and state jurisdictions that raise revenue through motor fuel taxation. Officially recognized "Tribal land" exists in some 32 states that generate in excess of $15 billion annually in motor fuel taxes. These taxes are remitted to the state taxing authorities primarily by wholesale and retail marketers whose place in the chain of distribution is in serious jeopardy as a result of the decision at issue here.

ARGUMENT

For decades, the federal and state governments collected taxes on the sale of motor fuels designated for on-road use, and they dedicated the proceeds thereof to various trust funds used for the construction and maintenance of the Nation's highway system. The segregation of highway trust funds from general revenues has

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4/ See p. 12 *infra*.

traditionally been predicated on the notion that motor fuel taxes are, in reality, user fees that should rightfully be reserved for highway use. In the federal system, for example, exemptions in the form of refunds are granted for off-road use, "reflect[ing] a congressional determination that, because the economic burden of such taxes is traditionally passed on to the purchaser-consumer in the form of increased pump prices, ... off-highway users should be relieved of the economic burden of the highway program..." *Gurley v. Rhoden*, 421 U.S. 200, 206 (1975).

Throughout this period, therefore, there has never been a question as to who bears the ultimate economic burden of the tax. Both in theory and in reality, the burden of the tax falls exclusively on motorists. Irrespective of the legal incidence of taxation, the full amount of the tax is routinely passed down the chain of distribution to the ultimate consumer.

While legislative debate concerning the level of taxation has traditionally centered on the impact of the tax on the consumer, an entirely different set of considerations is involved in determining the point in the distribution chain at which motor fuel taxes are collected and remitted, and hence the legal incidence of the taxation. Primary among these factors is the efficiency and economy with which motor fuel taxes can be collected, remitted to the appropriate governmental authority, and accounted for. The question in this regard is whether the interests of the federal and state governments are better served through collection of the tax from thousands of retailers, hundreds of distributors, or a handful of refiners and terminal operators. The legal incidence of the tax, therefore, is not likely to fall at the same point in the chain of distribution as the tax burden.

The decision of the court below stands for the proposition that a tax exemption attaches to Tribal enterprises that exist at any point in the chain of distribution that is coincident with the

legal incidence of taxation. It applies, moreover, irrespective of whether the motor fuel transported onto Indian country is for resale only and used almost exclusively off of Indian country on State jurisdiction roads. If the decision is allowed to stand, Tribal enterprises could shift their business activities up or down the distribution chain so as always to incur the legal incidence of taxation, thus meriting an exemption from the tax, and secure for themselves a price advantage with which no petroleum marketer could contend. The impacts of such tax-exempt competition would be devastating to independent terminal operators, distributors and retailers.

While the impact on marketers bears no direct relevance to the considerations involved in determining whether the tax intrudes impermissibly on Indian sovereignty, it bears ultimately on the manner in which the State of Oklahoma is affected. To the extent that petroleum marketers are displaced in the distribution scheme by non-tax paying Indian enterprises, the ability of the State to raise revenue through motor fuel excise taxes would be severely diminished. Thus, the threat to the State stems not only from existing revenue losses but from the market share growth that tax-exempt tribal enterprises will inevitably gain at the expense of existing marketers.

Moreover, because the Tenth Circuit views infringements on Tribal sovereignty as stemming from the legal incidence of taxation, as opposed to the tax burden, the impact on the State's ability to generate revenue through motor fuel taxes cannot be remedied by simply changing the point at which the legal incidence lies. If the Oklahoma legislature were to shift the legal incidence of the tax, for example, to the distributor, Tribal enterprises could operate as effectively at the distributor level as they do now as retailers. Thus, the potential for serious market dislocations and revenue losses lies in the notion that the incidence of the tax, and not the tax burden, is the measure of the

impact on Tribal self-government. If such a notion is to be the guiding principle in determining the tax-exempt status of Tribal enterprises, the ability of most states and the federal government to raise revenue through motor fuel taxes is in serious jeopardy.

Given the compelling state interest involved, and the fact that the economic burden of motor fuel taxation does not fall on the Tribe, the traditional balancing of interests should come down squarely on the side of the State. As this Court has often stated, any requirement that Tribes shoulder obligations related to tax collection and remittance does not impermissibly infringe upon Tribal self-government. *Moe v. Salish & Kootenai Tribes*, 425 US. 463, 483 (1976). The power to raise revenue, however, is at the core of state sovereignty.

I. THOSE RESPONSIBLE FOR THE COLLECTION AND REMITTANCE OF MOTOR FUEL EXCISE TAXES ARE INSULATED FROM THE TAX BURDEN

It is axiomatic that the collection of motor fuel taxes directly from hundreds of thousands of individual motorists is not an efficient or economic means of tax collection, and is riddled with a host of other problems related to an orderly administration and enforcement of the tax laws. For this reason, the federal government and the several states place the responsibility for collection and remittance on various entities in the chain of distribution, such as refiners, terminal operators, wholesale distributors and retailers. While these entities are legally responsible for collection and remittance, they are insulated and held harmless from the economic burdens of the tax.

The party responsible for remitting motor fuel tax to a federal or state taxing authority routinely passes the tax along to the purchaser at the next level of distribution as part of the

purchase price. *See, e.g., Gurley v. Rhoden*, 421 U.S. 200, 204 (1975) ("the economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise.") At the federal level, for example, refiners and, in some cases, terminal operators, are responsible for remitting federal excise taxes to the Internal Revenue Service.5/ The full amount of the tax, however, is recouped in sales to distributors and retailers. In fact, refiner invoices routinely contain a separate line item showing the per gallon amount of the motor fuel tax. Likewise, distributors that purchase from refiners pass along the full amount of the tax, shown as a separate line item on invoices, to their retailer customers. Retailers then recoup the full amount of the tax in their sales to motorists.

Similarly, according to the laws of the State of Oklahoma, distributors are responsible for remittance of the tax to the state taxing authority. Okla. Stat., tit. 68, §505B-C. While there is no formal requirement that the tax be included in the distributor's price to a retailer, common sense dictates that distributors are unwilling and, given market realties, unable to absorb the tax; they pass it along to their retailer customers.6/ As the district court noted, "[t]he retailers wholesale price will include the motor fuel taxes which are in turn included in the retail price at the

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5/ The federal government imposes an excise tax on gasoline and diesel fuel. 26 U.S.C. §4081 (Supp. 1994). The tax is imposed on:

> (a)(1)(A)(i) the removal of a taxable fuel from any refinery;
> (ii) the removal of a taxable fuel from any terminal.

The only exemption from this imposition of tax is for "bulk transfers to registered terminals or refineries." 26 U.S.C. §4081(a)(1)(B) (Supp. 1994).

6/ Indeed, the per gallon amount of the tax exceeds the distributor's margin on such sales. See p. 12 *infra*.

pump." Slip. Op. at 35a.7/ So common is the understanding that motor fuel taxes are user fees paid by the ultimate consumer that over seventy percent of the revenues derived from the Oklahoma tax are deposited in the State Transportation Fund for use in highway construction. Okla. Stat., tit. 68, §§504, 504.1, 518, 519, 523, 523.1 (1994). Most of the remainder is given to counties and municipalities for road maintenance. *Id.*

The parties that bear the legal incidence of motor fuel taxation, therefore, do not bear the economic burden of the tax. While they bear a certain administrative burden, the impact thereof is usually mitigated by the economic benefits that flow from their status as remitters. Because the collection and remittance of the tax do not occur simultaneously, with remittance required only at periodic intervals, those who collect the tax have the use of the proceeds for a period of time before they are required to be forwarded to the appropriate governmental authority. The use of the money, commonly referred to in the industry as the "float," is a valuable asset to entities existing at every level of distribution.

Thus, the parties on whom the legal incidence of taxation falls are not the tax payers. They are, in effect, collection agents who are insulated and held harmless from the economic burdens of taxation, and whose responsibility to remit the tax is often an economic asset. Because their responsibilities to collect and remit the tax are unrelated to motor fuel use, and are unrelated to the

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7/ The decision of the United States District Court for the Eastern District of Oklahoma, which has not been reported, is attached to the brief of the Oklahoma Tax Commission as Appendix B. The decision will heretofore be cited as "Slip Op. at _____."

economic burden of taxation, they bear no rational relationship to the need for a tax exemption.8/

II. THERE CAN BE NO UNLAWFUL INTERFERENCE WITH TRIBAL SELF-GOVERNMENT IN THE ABSENCE OF AN APPRECIABLE TAX BURDEN

The legal incidence of motor fuel taxation is a matter of state law. Accordingly, any determination of the legal incidence turns on an analysis of the enabling tax legislation and, consistent therewith, a determination of the party on whom the tax is imposed. Traditionally, the incidence of motor fuel taxation coincides with the party held accountable for the tax, usually the party responsible for remittance and in whose vendees no sanction lies for failure to pay. *See, e.g. W.M. Gurley v. Arny Rhoden*, 421 U.S. at 205-206. In the instant case, however, the court of appeals found the legal incidence of Oklahoma's motor fuel tax to reside with the retailer even though it is collected and remitted at the distributor level. 31 F.3d at 971. Although the court of appeals acknowledged that the statutory language is not clear, it rested its conclusion on a provision which indicated that

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8/ Tax exemptions are normally granted for reasons related to the use of motor fuel by consumers and not on the basis of the status of an entity as a tax collector or remitter. Because motor fuel taxes are regarded as user fees, for example, Oklahoma's tax is not due on diesel fuel "used exclusively for purposes other than to operate motor vehicles on the public highways of this state." Okla. Stat. tit. 68, §509.2A (Supp. 1994). Similarly, motor fuel used for public purposes is sometimes subject to an exemption. For example, fuel purchased by a county, city, or town for use in its vehicles is normally exempt from the Oklahoma tax. *Id.*, §509.2F. Any person who places tax-exempt diesel fuel into the tank of a motor vehicle "shall be liable for the tax." *Id.*, §509.2C.

distributors collect the tax and remit it "on behalf of licensed retailers." 31 F.3d at 971.

While the court of appeals correctly noted the distinction between the economic burden of the tax and its legal incidence,9/ it stopped short of examining whether the imposition of the tax, without the economic burden, has any appreciable impact on tribal self-government. The court makes no mention of the fact that the Tribe carries none of the burdens normally associated with the party on whom the tax is imposed. Not only is the Tribe insulated from the economic burden of taxation, it has no responsibility for the preparation of monthly reports or the collection and remittance of the tax. Oklahoma statutes place these responsibilities in the hands of the distributor. Okla. Stat. tit. 68 §505B-C. Nor is the Tribe subject to any sanction for failing to collect the tax from consumers or failing to remit it to the distributor. Thus, the contention that imposition of the tax on the Tribe impermissibly interferes with Tribal sovereignty is implausible.

In rendering its decision, the court of appeals refused to recognize that it is the burdens of taxation that carry the potential for infringing impermissibly on tribal sovereignty and not the manner in which the Oklahoma statute is worded. Indeed, the court of appeals refused even to concede that the economic burden of the tax falls on the ultimate consumer. Although the economic burden was obvious to the district court, the district court's conclusion was characterized by the court of appeals as

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9/ See 31 F.3d at 972 ("The question of who bears the ultimate economic burden of the tax is distinct from the question on whom the tax has been imposed.")

being grounded in "economic assumptions"10/ which the court refused to substitute for the language of the statute. In short, the court of appeals ignored the only element of taxation that could possibly impact on Tribal sovereignty,11/ and it applied a conclusive presumption, based on legal incidence alone, against the validity of the tax.

III. THE PRINCIPLES ESTABLISHED BY THE TENTH CIRCUIT SERIOUSLY JEOPARDIZE THE EXISTENCE OF INDEPENDENT PETROLEUM MARKETERS

To the extent that the Tenth Circuit's decision accurately reflects the governing principle regarding the tax exempt status of Tribal enterprises engaged in the sale of motor fuel, such enterprises are capable of devastating their competition at every level in the distribution chain. To the extent that Tribal enterprises operate as retailers, distributors, or terminal operators, or engage in motor fuel marketing at any point in the chain of distribution that bears the legal incidence of taxation, they would be entitled to a wholesale tax exemption. The cost advantages inherent in purchasing motor fuel on a tax exempt basis would provide Tribal enterprises with a corresponding resale price

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10/ 31 F.3d at 971.

11/ Even if the Tribe were required to bear the administrative burdens normally associated with imposition of the tax, there would have been no impermissible interference with Tribal sovereignty. The administrative and other burdens associated with collecting and remitting a tax are not burdens that frustrate Tribal self-government. *Moe v. Salish & Kootenai Tribes*, 425 U.S. at 483. States are free, therefore, to "require the Indian proprietor simply to add the tax to the sales price and thereby aid the State's collection..." *Id.* at 483. *See also, e.g., Department of Finance and Taxation of New York v. Milhelm Attea & Bros.*, 114 S.Ct. 2028, 2036 (1994).

advantage with which no one could compete. In an industry characterized by intense price rivalry, the difference of a penny or two (not to mention something on the order of Oklahoma's seventeen cent motor fuel tax) would guarantee Tribal terminal operators, distributors and retailers a limitless share of the market.

For example, in 1993, the entire price differential between the Nation's refiners' selling price of gasoline to resellers and the price consumers paid for that gasoline averaged only 14 cents per gallon.12/ Even if competing wholesalers and retailers sold their product at cost, they could not compete with Tribal enterprises that enjoyed a price advantage in the amount of the per gallon state or federal motor fuel tax. For the year 1994, state motor fuel taxes ranged from 8 cents per gallon in Alaska (gasoline) to 27.75 cents per gallon in Montana (diesel). Nationally, the average tax placed on a gallon of gasoline (federal and state) is 36.93 cents. On diesel, the average is 43.28 cents per gallon.13/

Thus, the Tenth Circuit's decision has ramifications in every state that taxes the on-road use of motor fuel. The implications of the decision extend as well to the federal motor fuel tax system which places the legal incidence of taxation at the refiner or terminal operator level. Were recognized Indian tribes to engage in motor fuel refining, their ability to diminish the

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12/ The U.S. Energy Information Administration reports "Sales For Resale" of gasoline in 1993 averaging 62.5 cents a gallon and sales "Through Company Outlets" averaging 76.5 cents a gallon. U.S. ENERGY INFORMATION ADMINISTRATION, PETROLEUM MARKETING MONTHLY, TABLE 13, (March 1994).

13/ FEDERAL HIGHWAY ADMINISTRATION, U.S. DEPT. OF TRANSPORTATION, MONTHLY MOTOR FUEL REPORTED BY STATE (July 1994).

market shares of existing refiners, and hence the revenues generated from federal motor fuel tax payments, would be limited only by the amount of capital they could attract to increase their refining capacity. This Court has consistently "rejected the proposition that 'principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere." *Milhelm Attea*, 114 S.Ct. at 2035 quoting *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980).

As developed more fully below, the application of such a principle would have a devastating impact on the ability of the federal and state governments to raise revenues through motor fuel taxes.

IV. THE PRINCIPLES ESTABLISHED BY THE TENTH CIRCUIT SERIOUSLY JEOPARDIZE THE ABILITY OF THE FEDERAL AND STATE GOVERNMENTS TO RAISE REVENUES THROUGH MOTOR FUEL TAXES

The amount of revenue generated in 1992 by the 32 states in which the U.S. Bureau of Indian Affairs reports "Tribal land"14/ was in excess of $15 billion annually,15/ representing over sixty-four percent of all of the state motor fuel

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14/ BUREAU OF INDIAN AFFAIRS, DIVISION OF TRUST RESPONSIBILITIES, U.S. DEPT. OF INTERIOR, ACREAGES OF INDIAN LANDS BY AREA AND STATE 3 (1990).

15/ FEDERAL HIGHWAY ADMINISTRATION, U.S. DEPT. OF TRANSPORTATION, HIGHWAY STATISTICS 83 (1992).

tax revenues generated nationwide.16/ The funds generated by these states for motor fuel taxation is used principally for state highway capital outlay maintenance and administration. The major secondary use for these funds is for local roads and streets. Less than 8 percent of the total is expended for non-highway purposes.17/

In 1992, the federal government raised almost $15 billion from motor fuel taxation, the overwhelming bulk of which was diverted to the highway trust fund, with the remainder going to mass transit projects aimed, among other things, at curtailing motor fuel use.18/ In 1993, the federal government raised the per gallon amount of gasoline tax from 14.1 cents to 18.4 cents. The federal tax on diesel fuel went from 20.1 cents per gallon to 24.4 cents per gallon. 26 U.S.C. §4081(a)(2)(Supp. 1994).

In short, motor fuel taxation is a significant source of revenue at both the state and federal levels, and it is essential to the future development and maintenance of the Nation's highway system. The decision at issue here seriously threatens the ability of federal and state taxing authorities to maintain revenues generated from motor fuel taxation at current levels. If motor fuel taxes cannot be imposed on Tribal enterprises that are held

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16/ *Ibid.*

17/ *Ibid* at p. 82.

18/ The legislative deliberations leading up to the increase focused on a number of factors, prominent among which was the impact of the increase on consumers who Congress recognized as bearing the ultimate economic burden of the taxation. *See, e.g., 139 Cong. Rec. H6098 (daily ed. Aug. 4, 1993) (remarks of Cong. Poshard); 139 Cong. Rec. H6132 (daily ed. Aug. 5, 1993) (remarks of Cong. Fowler); 139 Cong. Rec. S10683 (daily ed. Aug. 6, 1993) (remarks of Sen. Lott); Id. at S10728-29 (remarks at Sen. Biden).*

harmless from the economic burdens of the tax, an irresistible incentive would be created to convert their tax-free license into an ever-increasing share of motor fuel markets. The incentive would extend, moreover, to non-Indian investors whose capital would be necessary, in some cases, to make such an expansion a reality. The inevitable expansion of Indian enterprises at the expense of existing marketers would have dire consequences for the collection of motor fuel taxes at the state and federal level.

The governmental interests at stake, therefore, are compelling. They should take precedence even if the imposition of the tax had some appreciable impact on Tribal self-government. Here, however, the impact in non-existent. No rational basis exists for these important governmental interests to yield to abstract principles that have no direct bearing or practical impact on Tribal sovereignty.

CONCLUSION

On the basis of the foregoing, the decision of the Tenth Circuit Court of Appeals in this case should be reversed.

RESPECTFULLY SUBMITTED,

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APPENDIX

Amicus Curiae, Petroleum Marketers Association of America, is a non-profit trade association comprised of the following associations:

Alabama Oilmen's Association
Arizona Petroleum Marketers Association
Arkansas Oil Marketers Association, Inc.
California Independent Oil Marketers Association
Colorado Petroleum Marketers Association
Empire State Petroleum Association
Florida Petroleum Marketers Association
Fuel Merchants Association of New Jersey
Georgia Oilmen's Association
Idaho Oil Marketers Association
Illinois Petroleum Marketers Association
Independent Connecticut Petroleum Association
Independent Oil Marketers Association of New England
Indiana Oil Marketers Association, Inc.
Kansas Oil Marketers Association
Kentucky Petroleum Marketers Association
Louisiana Oil Marketers Association
Maine Oil Dealers Association
Michigan Petroleum Association
Mid-Atlantic Petroleum Distributors Association, Inc.
Minnesota Petroleum Marketers Association
Mississippi Petroleum Marketers Association
Missouri Petroleum Marketers Association
Montana Petroleum Marketers Association
Nebraska Petroleum Marketers, Inc.
Nevada Petroleum Marketers Association
New England Fuel Institute
New Mexico Petroleum Marketers Association
North Carolina Petroleum Marketers Association

Ohio Petroleum Marketers Association
Oklahoma Petroleum Marketers Association
Oregon Petroleum Marketers Association
Pennsylvania Petroleum Association, Inc.
Petroleum Marketers Association of Wisconsin, Inc.
South Carolina Petroleum Marketers Association
South Dakota Petroleum Marketers Association
Tennessee Oil Marketers Association
Texas Oil Marketers Association
Utah/Western Petroleum Marketers Association
Virginia Petroleum Jobbers Association
Washington Oil Marketers Association
West Virginia Petroleum Marketers Association
Wyoming Petroleum Marketers Association

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No. 94-771

In The

Supreme Court of the United States

October Term, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE MUSCOGEE (CREEK) NATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a state may regulate and tax commerce between a state motor fuel wholesaler and an Indian tribe.

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COMES NOW the Muscogee (Creek) Nation and submits the following brief pursuant to Sup.Ct. R. 37.3.

CONSENT TO FILING

The parties have consented to the Muscogee (Creek) Nation appearing as *amicus curiae.* Letters memorializing this consent will be filed simultaneously with the filing of this brief.

INTEREST OF *AMICUS CURIAE*

Amicus curiae is the Muscogee (Creek) Nation (hereafter "Muscogee"), a federally-recognized Indian tribe, whose national capital is located near Okmulgee, Oklahoma. The Muscogee exercise jurisdiction over Indian country that overlaps 11 counties created by the State of Oklahoma, *e.g.*, Tulsa is an "Old Creek town."[1] The Muscogee, like the respondent (Chickasaw Nation) are one of the Five Nations, formerly known as the Five Civilized Tribes, removed on the "Trail of Tears"[2] to Indian Territory from their homelands in

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[1] Angie Debo, *A History of the Indians of the United States* 4 (Norman, 1970).

[2] "The tragic suffering of the exiles on the Trail of Tears is familiar to all students of American history. It is matched only by the saturnalia of exploitation to which they were subjected by land speculators who crowded them from their homes before the time fixed for their emigration, and who possessed themselves of their individual allotments by every possible combination of violence and fraud." Angie Debo, *And Still the Waters Run* 5 (4th ed. Princeton Paperback Printing, 1991).

Georgia and Alabama. Within their Indian country, the Muscogee are wholesalers and retailers of various products, including motor fuel. The Muscogee interest in this suit is that Oklahoma has imposed regulations and taxes on motor fuel trade with Indian tribes. Further, the decision below is premised, in part, on promises by the federal government to respondent that appears in Muscogee treaties.[3]

SUMMARY OF ARGUMENT

Oklahoma's regulatory and taxing scheme[4] improperly burdens Indian commerce by requiring Indian traders selling fuels[5] to Indian tribes to collect a state-imposed tax on the purchaser who is an Indian tribe. The Tenth Circuit Court of Appeals held that this state taxation of an Indian tribe was improper. *Chickasaw Nation v. Oklahoma Tax Commission*, 31 F.3d 964, 972-973 (10th Cir. 1994). The Oklahoma Tax Commission's petition for review by *certiorari* should be denied because the Tenth Circuit opinion is consistent with many previous decisions of this court and because Oklahoma has a legislative (not judicial) remedy. Oklahoma's effort to tax Indian tribes is not consistent with the specific constitutional

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[3] *See* Treaty of March 24, 1832, 7 Stat. 366, art. XIV and Treaty with the Creek of June 14, 1866, 14 Stat. 785, art. XII cited by petitioner at page 28 of the "Petition for a Writ of Certiorari."

[4] 68 O.S. 1991 §§ 502, 502.2, 502.6, 516, 520, 522 (motor vehicle fuel) and §§ 502.1, 502.3, 502.5, 502.7, 522.1 (diesel fuel).

[5] The "power to regulate commerce . . . [is the power] to prescribe the rule by which commerce is to be governed." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196, 6 L.Ed. 23 (1824)

delegation of the authority for Congress to regulate trade with Indian tribes. U.S. CONST. art. I, § 8, cl. 3. This authority was not delegated to the federal judiciary[6] nor to state legislatures.

The power to regulate Indian trade is specifically granted to Congress. This grant, like the other portions of the Commerce Clause ("among the States" and "with Foreign nations"), was an explicit recognition of the need for one authority (the federal legislature, not the states) to regulate trade with Indian tribes. An implicit reason for this grant of authority was to protect the federal interest in treaties negotiated and to be negotiated by the United States with Indian tribes.[7] Had the states the authority to regulate and tax Indian trade, tribes undoubtedly would

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[6] "It is the congress, and not the judicial department, to which the constitution has given the power to regulate commerce . . . The courts can never take the initiative on this subject." *Transportation Co. v. Parkersburg*, 107 U.S. (17 Otto) 691, 701, 2 S.Ct. 732, 27 L.Ed. 584 (1883).

[7] Prior to ratification of the Constitution, Indian treaties included clauses such as: "[The tribes acknowledge that they are] under the protection of the United States and of no other sovereign whatsoever . . . For the benefit and comfort of the Indians, and for the prevention of injuries and oppression on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians." *Treaty with the Chickasaw*, 7 Stat. 24 (Jan. 10, 1786). Most treaties subsequent to the adoption of the constitution contained specific guarantees by the federal government to protect tribes from state incursion on tribal jurisdiction. *See, e.g., Treaty with the Creeks, 1856*; 11 Stat., 699, art. 4 (Aug. 7, 1856) ("The United States do hereby, solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek.").

not exist today.[8] Oklahoma should not be permitted to regulate and tax Indian commerce because same is a usurpation of federal constitutional authority and contrary to federal law including numerous treaties.

ARGUMENT

Petition for writ of *certiorari* is granted "only when there are special, important reasons therefor." Sup.Ct. R. 10.1. *See also Rice v. Sioux City Memorial Park Cemetery*, 749 U.S. 70, 73-74, 75 S.Ct. 614, 99 L.Ed. 897 (1955). The Oklahoma Tax Commission (Petitioner) has not posited any such "special and important" issue. The purported

[8] When the political situation was advantageous, states have unlawfully seized unilateral remedies to deprive tribes of rights protected by federal law. Just such a situation existed when this court decided *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832). "Conflict between state and tribal government was not, however, all that was involved in *Worcester*. . . . The unilateral legislative action of the state of Georgia, and similar actions taken simultaneously by Mississippi, Tennessee, and other states, were in part attributable to the election of Andrew Jackson as president. Jackson was perceived as an avowed enemy to Indian interests in the affected states (despite his military alliance with some of the affected tribes), and these states properly perceived that the federal government under Jackson's stewardship would not interfere in their unilateral extension of state authority over the tribe. Indeed, at least one historian has attributed to Jackson the following famous retort to the *Worcester* decision: 'John Marshall has made his decision; now let him enforce it.'. . . . For several years the Supreme Court decision was simply ignored – unprecedented constitutional phenomena, then and now." Robert N. Clinton, *et al.*, *American Indian Law* 28 (3rd ed. Michie Co., Va., 1991).

basis for seeking this writ is that Oklahoma should be allowed to tax Indian tribes because tribes incidentally benefit from the roads built and maintained by fuel tax revenue. *(Pet.* at 8. ["The motor fuel subject to tax is, in large measure, used *outside* of Indian country. And perhaps most significant, the tax revenues are used to defray the costs (of road construction and maintenance) imposed upon the *State* – and – *only* the State – by the use of the fuel." (emphasis in original]) This is not a new or novel issue and, further, is not accurate.

The constitutional grant of authority to Congress is "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Implicit in this language is that commerce with Indian tribes is separate and distinct from commerce with foreign nations and among the several states. However, the grant of power is identical ("to regulate") to that governing commerce "with foreign nations" and "among the several states." The federal Constitution arose from an experience with the Articles of Confederation that the central government simply had insufficient power to properly function.

> The Commerce Clause is said to have been suggested by James Monroe of Virginia, afterwards President, who believed national regulation 'necessary to preserve the union; without it, it will infallibly crumble to pieces.' As a member from 1783 to 1786 of the Congress under the Articles of Confederation, he endeavored to secure for Congress the power to regulate commerce and thereby remove what he considered the **chief defect in the existing government.**

Thomas James Norton, *The Constitution of the United States, Its Sources and Its Applications* 51 (The World Pub. Co., Cleveland & New York, 8th ed., June 1943) (emphasis added). Accordingly, the grants of powers by the states to the federal government were intentionally greatly strengthened when the Constitution was adopted by the states. This was certainly true of the portion of the Articles of Confederation that discussed trade with the Indians: "[Congress has] the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians, **not members of any of the states**, provided that legislative right of any state within its own limits be not infringed or violated . . . " *Articles of Confederation*, art. IX, ¶ 5 (emphasis added), reprinted in the U.S.C.A., *Const.* art. I, p. 11.

Under the original formulation, states were given exclusive regulatory authority for tribal trade occurring within their borders and the federal government was given exclusive jurisdictional control over Indian matters outside of state borders, *e.g.*, territories. Thus, when the Constitution was adopted with the Indian Commerce Clause, the clear inference was that the federal government was granted all of the power over Indian commerce to the exclusion of the states.

> Antecedently to the American Revolution the authority to regulate trade and intercourse with the Indian tribes, whether they were within, or without the boundaries of the colonies, was understood to belong to the colonies of the British crown. And after the American Revolution, the like power would naturally fall to the federal government with a view to the general peace and interest of all the states. Two

> restrictions, however, upon the power were incorporated with and into the confederation, which occasioned endless embarrassments and doubts . . . in this case, as in some other cases, the Articles of Confederation inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the union, with complete sovereignty in the states; to subvert a mathematical axiom, by taking away a part and letting the whole remain. The constitution has wisely disembarrassed the power of these two limitations; and has thus **given to Congress, as the only safe and proper depository, the exclusive power**, which belonged to the crown in the ante-revolutionary times; **a power indispensable to the peace of the states and to the just preservation of the rights and territory of the Indians** . . .
>
> . . . It is (says a learned commentator) wholly immaterial, whether such tribes continue seated within the boundaries of a state, and inhabit part of a territory, or roam at large over lands, to which the United States have no claim. The **trade with them is, in all its forms, subject exclusively to the regulation of Congress**. And in this particular, also, we trace the wisdom of the constitution. The Indians, not distracted by the discordant regulations of different states, are taught to trust one great body, whose justice they respect, and whose power they fear."

Joseph Story, *Commentaries on the Constitution* §§ 533-534 (Carolina Academic Press 1987) (1833) (emphasis added).

The Commerce Clause has been construed to preclude any state-imposed burden on interstate trade either *per se* or preemptively if congressional enactments signal

an intention to "occupy the field." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 339, 85 L.Ed. 581 (1941). In either event, the Oklahoma taxation statutes run afoul of federal law.

The history and practicalities of Indian commerce (as undoubtedly with foreign commerce) are such that this Court should construe the Indian commerce clause as granting exclusive power. Chief Justice Marshall in the seminal Interstate Commerce case explained that the commerce power is not "in its own nature . . . capable of residing in, and being exercised by, different authorities at the same time." *Gibbons v. Ogden*, 22 U.S. at 199-200. This language is even more appropriate in describing Indian commerce. As Marshall went on to say, "[a state in regulating interstate commerce] is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do." Oklahoma's desire to collect motor fuel taxes is simply not a sufficient legal reason for judicially amending the federal constitution to give states power to regulate and tax Indian commerce.[9]

Even if the Indian commerce clause is not construed as an exclusive grant of power, Congress has clearly preempted and fully occupied the field of Indian trading. The legislative intent, except as whether congress

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[9] *Cf. Dean Milk Company v. City of Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951). A legitimate state objective does not validate state laws imposing burdens on interstate commerce.

intended to occupy the field, is not relevant to the question of federal pre-emption. Federal pre-emption will always have effects not contemplated nor intended. The intent of the federal Indian trader's statutes was, as this Court has previously held, to occupy the field of Indian commerce.

> Indian traders trading on a reservation with reservation Indians are immune from a state tax like Arizona's, not simply because those activities take place on a reservation, but rather because Congress in the exercise of its power granted in Article I, § 8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject.

Warren Trading Post Co. v. Arizona State Tax Commission, 380 U.S. 685, 691 n. 18, 84 S.Ct. 1242, 14 L.Ed.2d 165 (1965). If an incidental result of the Indian Trader Acts is that goods can be purchased cheaper in Indian country than in the surrounding state, this consequence does not *ipso facto* empower Oklahoma to ignore federal pre-emption any more than a similar price differential would authorize Oklahoma to regulate trade with Kansas or Texas. Tax rate differentials among communities exist everywhere and do not lose their validity because one community has a lower rate, nor should they lose their validity simply because the community happens to be composed of Indians.

States May Not Tax Indian Tribes

Oklahoma is asking this court to review the Tenth Circuit opinion that states may not tax Indian tribes. The

Tenth Circuit holding is not new or novel, but wholly consistent with a long line of cases decided by this court extending back to nationhood. *See, e.g., The Kansas Indians*, 72 U.S. (5 Wall.) 737, 18 L.Ed. 667, 673 (1866) (Indian lands are withdrawn from the operation of state laws and may not be taxed); *Chouteau v. Burnett*, 283 U.S. 691, 51 S.Ct. 598, 601, 75 L.Ed. 1353 (1931) (individual tribal member's share of income received from tribal mineral lease not subject to taxation); *Warren Trading Post Co. v. Arizona State Tax Commission*, 380 U.S. at 691 (Indian traders on reservations are immune from state taxes); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 93 S.Ct. 1257, 1259, 36 L.Ed.2d 129 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 35 L.Ed.2d 114 (1973) (state may not tax individual incomes of Indians derived from reservation sources); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145-198, 100 S.Ct. 2578, 1288, 65 L.Ed.2d 665 (1980) (state may not impose use fuel taxes on non-Indian logging company for logging and hauling performed on Indian lands); *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160, 165, 100 S.Ct. 2592, 2596, 65 L.Ed.2d 684 (1980) (state gross receipts tax invalidated for on-reservation sale of goods to Indian tribe); *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832, 102 S.Ct. 3394, 3396, 73 L.Ed.2d 1174 (1982) (state may not tax gross receipts of non-Indian construction company received from Tribe for work on reservation); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985) ("Indian tribes and individuals generally are exempt from taxation within their own territory"); *Montana v. Crow Tribe of Indians*, 484 U.S. 997, 108 S.Ct. 685, 98 L.Ed.2d 683

(1988) summarily aff'g sub nom *The Crow Tribe of Indians v. Montana*, 819 F.2d 895, 903 (9th Cir. 1987) (taxing of Indian reservation lands or Indian income from activities carried out within reservation boundaries not permissible absent Congressional consent); *Rev. Rul. 67-284, 1967-2 C.B. 55* ("Income tax statutes do not tax Indian tribes. The tribe is not a taxable entity.") *See also Bryan v. Itasca County* 426 U.S. 373, 375-378, 392-393, 96 S.Ct. 2102, 2104-2106, 2112-2113, 48 L.Ed.2d 710 (1976); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-76, 96 S.Ct. 1634, 1642-1643, 48 L.Ed.2d 96 (1976).

Oklahoma's putative basis for seeking review is that Indian tribal members and the Indian tribe incidentally benefit from the roads built and maintained by the taxes that Oklahoma would impose on the tribe. (*See, e.g.*, Pet. at 44.) Again, this is not a new or novel complaint by states frustrated by lack of authority to tax Indian tribes. This argument has been made before and is simply immaterial. That people beyond the taxing authority of a state incidentally benefit from state public improvements does not generate any new taxing jurisdiction for states. Oklahoma could make the same argument for taxing Kansas, Texas, New Mexico, Colorado, Arkansas or Louisiana, because citizens in these states and (undoubtedly) the states themselves incidentally benefit from the roads in Oklahoma.

Beyond the immateriality of this argument is that Oklahoma is not telling the full story. Roads in Oklahoma (particularly those that incidentally benefit the tribe and tribal members) include many built and maintained because of treaty obligations the federal government owes Indian tribes. *Amicus*, like Respondent and other

Indian tribes, gave up many valuable rights to the federal government. In exchange, the federal government made many promises to *amicus*, as the federal government did to Respondent and other Indian tribes, including that Indian tribes would not be subject to state taxation. Under federal Law, *amicus* retained rights to public highways or roads along section lines and "elsewhere whenever necessary for the public good."[10] The federal and tribal governments have constructed and maintained many roads. *See e.g.*, 25 C.F.R. §§ 170.1 *et seq.* As a result of these treaty provisions and other federal laws, many roads have been built and maintained that directly benefit Oklahoma and its citizens.[11]

In a survey of the Five Nations,[12] the Oklahoma State Indian Affairs Commission concluded that these tribal governments "produced direct total expenditures of $92.2 million dollars from federal and own resources" in 1990. Further, the Commission found that "including Medicaid, AFDC and the **highway program**, the State of Oklahoma

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[10] *See* Act of June 30, 1902, ch. 1323, § 10.

[11] A recent article about the federal Indian road program was appropriately headlined: "Obscure Indian Road Program Spends Millions," published May 29, 1994, on page 23 of Section A to *The Sunday Oklahoman* ("this year . . . the Muscogee [area] office divided $13.3 million among the tribes it serves, according to BIA figures").

[12] The Respondent and Amicus are two of the Five Nations. The others are the Seminole, the Choctaw Nation, and the Cherokee Nation.

collected a total of $1.567 billion dollars in federal grants" in 1991.[13]

According to the Bureau of Indian Affairs ("BIA"), the projected figures for 1994 obligate $3,756,000 in federal monies to the Anadarko Area[14] for the building and maintenance of roads in that area. In the Muskogee Area, $13,410,000 in federal monies have been obligated by the federal government in order to construct and maintain roads and highways in 1994. Additional contributions of $934,000 and $436,000 have been made to Anadarko and Muskogee areas, respectfully. These contributions do not include emergency funding contributions made periodically throughout 1994.[15]

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[13] "Economic Impact of Tribal Tax and Expenditure programs in the State of Oklahoma," Summary of Findings Prepared for the George Washington University Center for Native American Studies and Indian Policy Developments and the Oklahoma State Indian Affairs Commission, p. 6 (Jan. 1992) citing Advisory Commission of Intergovernmental Affairs, *Significant Features of Fiscal Federalism: Volume 2: Revenues and Expenditures*; October, 1991, p. 53 (emphasis added).

[14] The BIA has two area offices in Oklahoma. The Anadarko Area Office services tribes in Western Oklahoma. The Muskogee Area Office services the Eastern tries, *i.e.*, essentially the Five Nations. *Cf.* 25 U.S.C.A. § 40; 25 C.F.R. § 11.1, ¶¶ (a)(19) and (a)(23).

[15] These figures were provided by the Bureau of Indian Affairs, Anadarko Area, but have yet to be finalized and reconciled with the actual federal spending. This will be done at the opening of the 1995 calendar year.

These figures simply give the lie to Oklahoma's implication that Indian tribes are getting and will continue to get a "free ride"[16] unless Oklahoma has authority to tax tribes. If anything, Oklahoma is benefiting from the presence of Indian tribes far in excess of any incidental benefits that untaxed tribes receive from roads built and maintained by Oklahoma.

Legislative Not Judicial Response Available

In finding that the incidence of the Oklahoma motor fuel tax was upon the Indian tribe, the Tenth Circuit implied that Oklahoma could obtain the fuel tax revenues by legislatively changing who bears the incidence of the tax.

> [A] nondiscriminatory tax imposed on the non-exempt private entities that do business with Indian tribes and that pass the cost of those taxes on to the tribe does not violate tribal sovereign immunity.

Chickasaw Nation v. Oklahoma Tax Commission, 31 F.2d at 970.

Thus, Oklahoma can unilaterally respond to the Tenth Circuit opinion (assuming any response is necessary) without asking this court to overturn 200 years of case law holding that states cannot tax Indian tribes. Oklahoma's need for this heretofore unauthorized taxing authority simply does not exist.

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[16] *See, e.g.*, Pet. at 15. "It is the existence of state funded public highways that makes possible the Tribe's sale of fuel . . . "

CONCLUSION

Oklahoma's petition for *certiorari* should be denied.

Respectfully Submitted

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v.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTIONS PRESENTED

1. Whether principles of federal preemption or Indian sovereignty preclude a State from imposing a tax on sales of motor fuel by an Indian tribe, when the fuel is purchased in substantial part by non-Indians or non-members of the Tribe, and the fuel is used outside of Indian country on roads constructed and maintained by the State.

2. Whether the legal incidence of Oklahoma's tax on motor fuel falls on the ultimate purchaser of the fuel.

3. Whether federal law precludes state taxation of the income of Indians who work on tribal trust lands but live outside of Indian country.

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 31 F.3d 964. The opinion of the district court (Pet. App. 32a-38a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 29, 1994. The petition for a writ of certiorari was filed on

October 27, 1994 and was granted on January 6, 1995. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Relevant portions of Okla. Stat., Tit. 68, Art. 5, and of the Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333, are reprinted at Pet. App. 39a-43a.

STATEMENT

The court of appeals' decision in this case imposes an extraordinary restriction on state taxing authority. The court held that imposition of a state tax on motor fuel sold by an Indian tribe is precluded by principles of federal preemption and Indian sovereignty — even though much of the fuel is sold to non-Indians, and virtually all of it is used outside of Indian country on roads constructed and maintained by the State. The court also held that federal law precludes the imposition of a state income tax on tribal members who are employed on tribal trust lands but who live outside of Indian country. These holdings are premised on formalism rather than economic reality, disregard the State's interest in taxing the recipients of state services, and — not surprisingly — depart from the decisions of this Court. They should be set aside.

1. The State of Oklahoma imposes a tax "upon the sale of each and every gallon" of gasoline and diesel fuel sold within the State. Okla. Stat., Tit. 68, §§ 502, 502.1. See also *id.*, §§ 502.2, 502.3, 502.4, 502.5, 502.6, 502.7, 516, 520, 522, 522.1. The tax statute makes the distributors of the fuel "agent[s] of the state for the collection of the excise tax" (*id.* § 506) and requires them to pay the tax due on each gallon of fuel sold to retailers or others in Oklahoma (*id.* § 505), although "[t]he retailer's wholesale price will include the motor fuel taxes which are in turn included in the retail price at the pump." Pet. App. 35a. The tax, imposed at the rate of $.17 per gallon on gasoline and $.14 per gallon on

diesel fuel, is a significant source of revenue for Oklahoma, generating approximately $320 million annually. See Okla. Stat. Tit. 68, §§ 502, 502.1, 502.2, 502.3, 502.4, 502.5, 506.2, 502.7, 520, 522, and 522.1. Over 70% of this revenue is deposited in the State Transportation Fund for use in highway construction; most of the remainder is given to counties and municipalities for road maintenance. .See *id.* §§ 504, 504.1, 518, 519, 523, 523.1.

2. Respondent ("the Tribe"), a federally recognized Indian tribe, is one of the "Five Civilized Tribes" that were relocated in the 1830s from the southeastern United States to the area that became known as Indian Territory in what is now the State of Oklahoma. See *Felix S. Cohen's Handbook of Federal Indian Law* 426 (1971 ed.); A. Gibson, *The Chickasaws* 142-162 (1971). In 1837 the Tribe received title to a substantial tract of land in what currently is southern Oklahoma on the understanding, as stated in the 1830 Treaty of Dancing Rabbit Creek, that "no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw Nation] of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State." 7 Stat. 333.[1]

In later years, however, congressional policy towards the Five Civilized Tribes underwent a radical change. Far from precluding the application of state or territorial law to those

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[1] This treaty actually was concluded with the Choctaw Nation, another of the Five Civilized Tribes. The lands deeded to the Chickasaw were purchased from the Choctaw, however, and the United States agreed that these lands would "be held [by the Chickasaw] on the same terms that the Choctaw now hold it." Treaty With the Choctaw and Chickasaw, 11 Stat. 573 (1837). Because the Five Civilized Tribes supported the Confederacy during the Civil War, Congress authorized the President to abrogate the existing treaties with the Tribes in 1862. Act of July 5, 1862, 12 Stat. 512, 528. A new treaty was negotiated with the Choctaw and Chickasaw in 1866 pursuant to this authority, but it did not change the substance of the provision quoted in text. See 14 Stat. 769.

Tribes, Congress itself made the Indian Territory subject first to the laws of Arkansas (see Act of May 2, 1890, 26 Stat. 81; Act of April 28, 1904, 33 Stat. 573) and then to the laws of the Oklahoma Territory. Act of June 16, 1906, 34 Stat. 267. Meanwhile, Congress also began a process, which was completed early in this century, of providing for the allotment of most Chickasaw lands to individual members of the Tribe, with much of the remainder to be held in trust by the United States for the Tribe's benefit. See *Woodward* v. *DeGraffenreid*, 238 U.S. 284 (1915); F. Cohen, *supra*, at 430-437. This "virtual dissolution of the tribal governments in the Indian Territory cleared the way for the creation of another state" (F. Cohen, *supra*, at 428); in 1906 Congress accordingly provided for the admission into the Union of the combined Indian and Oklahoma Territories as the State of Oklahoma. The following year the Tribe's lands — now a "checkerboard" of scattered allotments and trust lands (cf. *Oklahoma Tax Comm'n* v. *Sac and Fox Nation*, 113 S. Ct. 1985, 1993 (1993)) — were embraced within state boundaries with the admission of Oklahoma to the Union.[2]

3. The Tribe currently owns and operates convenience stores on lands held in trust for it by the United States. These stores, which are open to the general public, sell motor fuel and other goods both to tribal members and to non-member customers. Pet. App. 2a. While the State has exempted from tax fuel purchased by respondent for use in

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[2] Surveying the "situation" of the Five Civilized Tribes, the Court has observed that "[a]lthough there are remnants of the form of tribal sovereignty, these Indians have no effective tribal autonomy" and have "little to distinguish them from all other citizens." *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 603 (1943). See also F. Cohen, *supra*, at 429-430. The Court has also noted, however, that under the Indian Reorganization Act of 1934, 25 U.S.C. § 461 *et seq.*, and the Oklahoma Indian Welfare Act of 1936, 25 U.S.C. § 501 *et seq.*, "some progress has been made in the restoration of tribal government." *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. at 603 n.5.

tribally owned vehicles (see *id.* at 35a), it has collected the tax on fuel obtained by respondent for resale at the Tribe's convenience stores.

Invoking principles of preemption and Indian sovereignty, respondent brought this suit against the Commission in 1991, seeking to enjoin collection of the tax "on *all* motor fuel it purchases for resale" (Pet. App. 35a (emphasis added)) — including fuel sold to non-Indians for use on state roads lying outside of Indian country.[3] The United States District Court for the Eastern District of Oklahoma rejected respondent's claim. *Id.* at 35a-38a. The court began by noting that "[f]ederal law does not preempt the state motor fuel tax scheme," which meant that the Tribe could prevail only by "show[ing] that the motor fuel tax infringes on the right of tribal self-government." *Id.* at 36a. On that issue, the district court explained that this Court's decisions "seek[] an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Ibid.*

In conducting that inquiry, the court accepted a series of factual stipulations:

> In Oklahoma the gasoline transported onto Indian country is for resale only and is used almost exclusively off of Indian country on State jurisdiction roads. * * *
>
> Further, the Tribe does not construct or maintain roads and highways for the use of the general public in Oklahoma. The State of Oklahoma constructs and maintains 111,412.76 miles of streets, roads and highways in Oklahoma which is funded by the state tax on motor fuel. All of the road mileage maintained by the state is off Indian Country.

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[3] Indian country generally includes not only formal reservations, but also Indian allotments and trust lands. See *Sac and Fox*, 113 S. Ct. at 1991; *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n.2 (1975).

Pet. App. 36a-37a.

Against this background, the court found that the tax exemption sought by respondent would serve principally to permit it "'to market an exemption from state taxation to persons who would normally do their business elsewhere.'" Pet. App. 37a, quoting *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 155 (1980). In addition, because the motor fuel subject to tax is used almost exclusively on state roads maintained by Oklahoma outside Indian country, "the gasoline tax used to maintain these roads is directed at off-reservation value where the taxpayer is receiving State services, whether the taxpayer is a tribal member or not." *Ibid.* "In this context," the court concluded, "the patrons of tribal gas stations are properly subject to the State's motor fuel taxes." *Ibid.*

The court of appeals reversed, holding that the district court erred in two respects. Pet. App. 12a-16a. First, the court of appeals concluded that the district court should have found the legal incidence of the tax to be on the retailer and therefore, in this case, on the Tribe. The court of appeals recognized that "the statutes do not expressly declare the legal incidence of the taxes to be on the retailer" (*id.* at 13a) and acknowledged that "it may well be that the tax is ultimately passed on to the consumer at the pump." *Id.* at 14a. But the court nevertheless relied on the observation that "[t]he statutes nowhere require the amount of the tax to be included in the retail price at the pump, a requirement which we could interpret as imposing the tax on the consumer." *Id.* at 13a. The court also found that certain statutory provisions — in particular, those providing that distributors receive credits for tax remittances that cannot be collected from retailers — make the distributor "no more than a transmittal agent for the taxes imposed on the retailer." *Id.* at 14a.

In this setting, the court of appeals concluded that the district court also erred in rejecting respondent's claim that

the motor fuel tax was displaced by principles of Indian sovereignty. The court of appeals reasoned that

> [b]ecause they are directed toward funding traditional government activities, the taxes fall within the ambit of the sovereignty of the tribal government. * * * Where the state action conflicts with a power within the traditional scope of Indian sovereign authority, preemption is presumed in the absence of an explicit statement of congressional intent to the contrary.

Pet. App. 15a-16a. The court of appeals therefore held that "the district court's balancing of the respective tribal and state interests at stake was not relevant to the determination of the propriety of the fuel taxes"; it directed a grant of summary judgment in the Tribe's favor. *Id.* at 16a.

4. This case also involves a claim that the State cannot impose its income tax on persons who are employed by the Tribe on tribal trust lands. See Pet. App. 33a. The district court found that claim controlled by the Tenth Circuit's decision in *Sac and Fox Nation* v. *Oklahoma Tax Comm'n*, 967 F.2d 1425 (1992), and dismissed it as moot. Pet. App. 38a. While the appeal in this case was pending, however, this Court vacated and remanded the Tenth Circuit's decision in *Sac and Fox* (see *Oklahoma Tax Comm'n* v. *Sac and Fox Nation*, 113 S. Ct. 1985 (1993)), and the court below accordingly addressed the merits of respondent's claim.

The court of appeals first held that the State may impose the tax on tribal employees who are not members of the Tribe (Pet. App. 21a-22a), but that the tax may not be applied to employees who are members of the Tribe and who live on trust lands or in Indian country. *Id.* at 23a-24a. In the portion of the holding at issue here, the court then held that the state may *not* tax the income of tribal members who are employed by the Tribe but who live *outside* of Indian country. Noting that this Court in *Sac and Fox* left open the question whether such persons are presumptively outside the

scope of the State's taxing jurisdiction (*id.* at 25a, citing 113 S. Ct. at 1992), the court of appeals concluded that such a presumption should not apply. See *id.* at 26a.

The court nevertheless held, however, that state taxation of tribal members is expressly barred by the United States' treaty with the Chickasaw Nation. That treaty provides, in relevant part:

> The Government and the people of the United States are hereby obliged to *secure to the said [Chickasaw] Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants; and that no part of the land granted them shall ever be embraced in any Territory or State*; but the U.S. shall forever secure said [Chickasaw] Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.

Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333 (emphasis added).[4] The court concluded that "[t]he crucial question in determining the validity of the income tax under the relevant treaty language is * * * whether the law is one imposed on the Chickasaw Nation or its descendants. Residency is simply not relevant to this determination." Pet. App. 30a. The court therefore held that Oklahoma's income tax may not be imposed "on the wages of Chickasaw

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[4] As noted above (at note 1), the treaty actually was concluded with the Choctaw Nation but became applicable to the Chickasaw Nation in 1837. See also Pet. App. 29a-30a & n.10.

members, earned on the reservation or in Indian country, regardless of the residence of those members." *Ibid.*[5]

SUMMARY OF ARGUMENT

1. The court of appeals' invalidation of Oklahoma's fuel tax as it applies to sales by the Tribe is insupportable. As an initial matter, the court's decision cannot be reconciled with the Hayden-Cartwright Act, 4 U.S.C. § 104, which expressly authorizes state taxation of motor fuel sales on federal reservations. But even apart from the Act, the court of appeals' application of a *conclusive* presumption against the validity of state taxation cannot bear scrutiny. This Court's modern decisions have grounded Indian tax immunities on the general preemption principles that govern all assertions of state authority affecting reservation activities, which require a particularized examination of relevant state and tribal interests. And while the Indian interest in immunity from state taxation typically is strong and the State's interest in taxing reservation activities typically is weak, that generalization hardly justifies tax immunity when it is demonstrated in a particular case that the state's justification for laying the tax is compelling, the tribal interest in resisting it is insubstantial, and the tax would have no effect on tribal governance or self-determination.

This is just such a case. Because the fuel sold by the Tribe is used almost exclusively on state roads, the activity subject to tax imposes very substantial costs on the State — but no burden at all on the Tribe. In these circumstances, imposition of the tax has *no* bearing on tribal self-

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[5] The decision below also addressed challenges to two other Oklahoma taxes. The court of appeals upheld the validity of the State's tax on 3.2% beer sold in tribal stores. Pet. App. 4a-12a. In addition, respondent contended that the State was improperly requiring the collection of sales tax on retail sales made to the Tribe; the State responded that it treated such sales as exempt from tax. Both the Tribe and the court accepted Oklahoma's statement of its policy as valid. *Id.* at 16a-19a.

government. And the levy does not reach any value generated by the Tribe on Indian land; the tax falls on "on-reservation sales outlets which market to non-members goods not manufactured by the tribe or its members, in which the tribal contribution to [the] enterprise is *de minimis*." *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 341 (1983). This is the paradigm of a case in which the Court has indicated that there is no tribal interest supporting immunity from state law.

On the other side of the equation, the State has a powerful interest in imposing the tax: the sale and use of motor fuel has a significant impact beyond the limits of Indian country. Tax immunity therefore would give the Tribe an enormous windfall, while leaving the State with none of the revenues but all of the burdens flowing from the Tribe's activity. And that becomes particularly clear when it is recognized that the decision below rests entirely on a formalism. It is plain from this Court's decisions that the State could impose precisely the same burden on the Tribe that it would bear if subjected directly to the tax by instead declaring the legal incidence of the tax to fall on the consumer and directing the Tribe to collect and remit the levy. By invalidating the tax because its legal incidence instead was said to fall on the Tribe, the court below "focus[ed] on [a] formalism [that] merely obscures the question whether the tax produces a forbidden effect." *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977).

2. If we are wrong in our first submission and the Court concludes that the legal incidence of a state tax never may be imposed on an Indian tribe, the decision below nevertheless should be set aside: the court of appeals erred in holding that the legal incidence of the fuel tax falls on the retailer. Under this Court's decisions, the legal incidence of a tax is borne not by the entity that has legal liability for payment, but rather by the one that the legislature intends to

bear the burden of the levy. Here, that plainly is the consumer. The basic definitional elements of the tax code indicate that both the distributor *and the retailer* are expected to pass the tax on to someone further down the distribution chain, while the code's tax exemptions expressly relieve certain *consumers* of the burden that they otherwise would carry of paying the tax. It may be added that if we are wrong in our definition of legal incidence — so that the legal incidence of a tax is borne only by those who are in some way subject to legal liability for payment of the tax — the incidence of the fuel tax plainly falls on the *distributor*, the only entity in the distribution chain that has any legal obligation to do anything.

3. The court of appeals' holding that the treaty with the Chickasaw Nation precludes the imposition of state income tax on members of the Tribe who work on trust lands but live outside Indian country is insupportable. The court concluded that the treaty, which grants the Chicksaw Nation jurisdiction "within their limits west, so that" states may not "pass laws for the government of the [Chickasaw] Nation," confers tax immunity on any member of the Tribe, irrespective of residence. But the court of appeals' approach is plainly inconsistent with the terms of the treaty, which provides the Tribe with rights only within its territorial "limits." This understanding is confirmed by the treaty's history. By guaranteeing the Chickasaw Nation that its territory would never "be embraced in any Territory or State," the treaty literally removed the Tribe from state jurisdiction; now that Congress has changed its policy and encompassed the Tribe within the State of Oklahoma, it cannot be the case that tribal members who live outside of tribal territory are exempt from state law.

ARGUMENT

This case involves a "vexing" question (*Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 138 (1980)) that "has occupied the Court many times in the recent past" (*Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, 458 U.S. 832, 847 (1982) (Rehnquist, J., dissenting)): how to "'reconcile the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations.'" *Department of Taxation and Finance* v. *Milhelm Attea & Bros.*, 114 S. Ct. 2028, 2035 (1994), quoting *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 165 (1973). The court of appeals' answer to that question is wrong in several fundamental respects. The approach taken by the court below avowedly elevates form over substance, wholly disregarding the States' interest in taxing the recipients of state services; it departs from this Court's precedents in the placement of the legal incidence of the challenged tax; and it distorts the plain language of the relevant treaty. The decision accordingly should be reversed.

I. OKLAHOMA'S FUEL TAX MAY BE APPLIED TO SALES BY THE TRIBE

A. The Sale Of Fuel That Is Used Almost Exclusively On State Jurisdiction Roads Is Subject To Tax

At the outset, there are several areas of common ground between the parties that must frame the Court's analysis of the fuel tax in this case. *First* is the nature of the tax. The economic burden of the tax plainly falls upon the ultimate consumer of fuel, as the court of appeals itself understood; the court acknowledged that "it may well be that the tax is ultimately passed on to the consumer at the pump." Pet. App. 14a. See *Gurley* v. *Rhoden*, 421 U.S. 200, 204 (1975) ("The economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise."). The purchasers bearing that burden are, in

substantial part, *non-Indians* or *non-members* of the Tribe.[6] The motor fuel subject to tax is used almost exclusively *outside* of Indian country on state jurisdiction roads. And the tax revenues are used to defray the costs (of road construction and maintenance) imposed upon the *State* — and *only* upon the State — by the use of that fuel; the Tribe does not construct, police, or maintain significant road mileage.

Second, there is no denying that the court of appeals' invalidation of the fuel tax rested on a formalism. The court properly did not suggest that the tax was preempted by the terms of any treaty; instead, it found that the legal incidence of the tax falls upon the retailer (and therefore, in this case, upon the Tribe), and proceeded to apply a *conclusive* presumption against the validity of such a tax. We explain below that the court's placement of the levy's legal incidence was wrong. But even granting for the moment that the legal incidence of the tax does fall upon the Tribe, it is beyond dispute that, at least so far as sales to non-members of the Tribe are concerned, Oklahoma could permissibly impose a tax that is, in all essential respects, *identical* to the one invalidated by the court of appeals. It has long been settled, and the Tribe does not dispute, that a State may require an Indian tribe to collect a tax on on-reservation sales to non-members where the legal incidence of the levy falls on the purchaser. See pages 17-18, *infra*. This means, as the Tribe itself acknowledged in its brief in opposition to the petition for certiorari (at 7), that Oklahoma could cure the asserted defect in the tax with "a stroke of the pen" simply by

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[6] The Court has made clear that Indians who reside in Indian country but who are not members of the Tribe with local jurisdiction are not entitled to the protections of the Indian preemption and sovereignty doctrines. See, *e.g.*, *Colville*, 447 U.S at 160-161. References in this brief to non-members of the Tribe accordingly describe both non-Indians and Indians who are not members of the Chickasaw Nation.

declaring the levy's legal incidence to fall on the ultimate consumer rather than the retailer.

Against this background, the question in this case is whether the formalism of "legal incidence" precludes imposition of a state tax on tribal transactions that impose enormous burdens on the State and no burdens at all on the Tribe, and that in large part are concluded with non-members. In answering that question, the court below expressly disregarded economic realities, declaring the competing state and tribal interests "not relevant." Pet. App. 16a. In our view, however, the court of appeals' answer plainly departed from this Court's precedents: it elevated form over substance, ignored the substantial extra-reservation consequences of the taxed activities, and imposed a dramatic restriction on state taxing authority. That decision also cannot be reconciled with the plain terms of the Hayden-Cartwright Act, 4 U.S.C. § 104, which expressly authorizes state taxation of motor fuel sales made on federal reservations, including Indian reservations. The holding below therefore is insupportable.

1. The Balance Of State And Tribal Interests.

a. Although it once was thought that States lacked any power to assert their authority on Indian reservations, the Court "[l]ong ago * * * departed from Mr. Chief Justice Marshall's view," expressed in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), "that 'the laws of [a State] can have no force within reservation boundaries.'" *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 141 (1980), quoting *Worcester*, 31 U.S. (6 Pet.) at 561. See *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 331 (1983); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973). Instead, the Court has recognized that "through their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many of the attributes of sovereignty." *Montana* v. *United States*,

450 U.S. 544, 563 (1981). As a consequence, "tribes do not possess the same attributes of sovereignty that the Federal Government and the several States enjoy." *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 169 (1982) (Stevens, J., dissenting).

Although the court below resolved this case through application of a dispositive presumption, the recognition of limitations on tribal sovereignty has led the Court to the conclusion that, as a general matter, "there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members." *White Mountain Apache*, 448 U.S. at 142. "Instead, [the Court] ha[s] applied a flexible preemption analysis sensitive to the particular facts and legislation involved. Each case 'requires a particularized examination of the relevant state, federal, and tribal interests.'" *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 176 (1989) (citation omitted). As the Court explained just last Term,

> [r]esolution of conflicts of this kind does not depend on "rigid rule[s]" nor on "mechanical or absolute conceptions of state or tribal sovereignty," but instead on a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law."

Milhelm Attea, 114 S. Ct. at 2035 (citation omitted). See also, *e.g.*, *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 241-215 (1985); *id.* at 223 (Stevens, J., dissenting). The controlling test accordingly looks both to tribal interests and to whether the "state interests at stake are sufficient to justify the assertion of state authority." *New Mexico* v. *Mescalero Apache*, 462 U.S. at 334.

In conducting this inquiry, "'[c]ongressional authority and the "semi-independent position" of Indian tribes * * * [are] two independent but related barriers to the assertion of

state regulatory authority over tribal reservations and members.'" *Rice* v. *Rehner*, 463 U.S. 713, 718 (1983) (citations omitted). This means that "state authority may be preempted by federal law, or it may interfere with the tribe's ability to exercise its sovereign functions." *Ramah Navajo*, 458 U.S. at 837 (citation omitted). This distinction may not make much of a practical difference, however. While "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal preemption" (*McClanahan*, 411 U.S. at 172; see *Rice*, 463 U.S. at 718-719; *Colville*, 447 U.S. at 178-179 (opinion of Rehnquist, J.)), principles of Indian sovereignty "provide[] a backdrop against which the applicable treaties and federal statutes must be read." *McClanahan*, 411 U.S. at 172. Those principles accordingly give content to the unique preemption doctrine that is applied to state laws affecting Indians. See generally *Rice*, 463 U.S. at 718-719; *White Mountain Apache*, 448 U.S. at 143; *McClanahan*, 411 U.S. at 172. The practicalities of Indian self-government therefore bear on the existence of preemption.

b. While the Court has not set out a precise formula to govern in these cases involving overlapping state and tribal concerns, it has offered "[c]ertain broad considerations [that] guide our assessment" of the competing interests. *New Mexico* v. *Mescalero Apache*, 462 U.S. at 334. On the tribe's side of this equation, the Court looks above all to whether application of state law on tribal lands "'would interfere with reservation self-government'" (*Rice*, 463 U.S. at 718, quoting *Mescalero Apache* v. *Jones*, 411 U.S. at 148); "'the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.'" *McClanahan*, 411 U.S. at 172 (citation omitted). In undertaking this assessment, the Court has found the tribal interest particularly weighty where the state action affects the tribe's relations only with its own members. See *Montana* v. *United States*, 450 U.S. at 564.

And not surprisingly, the Court is apt to find the assertion of state authority untenable where it is "unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes" (*White Mountain Apache*, 448 U.S. at 148-149; see *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 691 (1965)), or where the State seeks revenues "derived from value generated on the reservation by activities involving the Tribes." *Colville*, 447 U.S. at 156-157.

At the same time, in completing this calculus the Court has "recognized that 'any applicable regulatory interest of the State must be given weight.'" *Rice*, 463 U.S. at 719. Thus, "[a] State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention"; the State's "'interest in raising revenue is ... strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.'" *New Mexico* v. *Mescalero Apache*, 462 U.S. at 336, quoting *Colville*, 447 U.S. at 157 (ellipses inserted by the Court). By the same token, the State has a correspondingly strong interest where the tribal activities involve non-Indians and where the tribe, rather than producing on-reservation value, is simply importing goods into Indian country for immediate resale. See *Cabazon Band*, 480 U.S. at 219-220.

The Court has followed this approach of balancing the state and tribal interests in assessing the validity of at least some aspects of state taxation. It is clear, for example, that the principle of Indian sovereignty does not preclude imposition of state taxes that fall on an Indian tribe for "tribal activities conducted outside the reservation." *Mescalero Apache* v. *Jones*, 411 U.S. at 148. See *Colville*, 447 U.S. at 163-164. Even as to activities taking place on reservation or trust lands, it also is plain that "sales to persons other than reservation Indians * * * are legitimately subject to state taxation." *Milhelm Attea*, 114 S. Ct. at 2031. And so far as such transactions are concerned, the Court has held repeatedly

that States may exercise their authority *directly against tribes* by requiring them to shoulder tax collection obligations on the States' behalf; States may "impose tax collection and bookkeeping burdens on reservation retailers who are themselves enrolled tribal members, including stores operated by the tribes themselves." *Id.* at 2036. See *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512, 513 (1991); *California State Board of Equalization* v. *Chemehuevi Indian Tribe*, 474 U.S. 9, 12 (1985) (per curiam); *Colville*, 447 U.S. at 151, 159; *Moe* v. *Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 481-483 (1976).

2. Federal Law Does Not Preclude State Taxation Of Indian Tribes In All Circumstances. a. Having said this, we of course recognize that the Court has been especially vigilant in protecting tribal interests where the full weight of state taxation has fallen directly upon the on-reservation activities of Indian tribes. The Court thus has characterized *McClanahan*, the seminal modern decision in the area, as holding that

> even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law. * * * Even so, in the special area of state taxation, absent cession of jurisdiction or other federal statutes permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation.

Mescalero Apache v. *Jones*, 411 U.S. at 148. See *Moe*, 425 U.S. at 475-476.

The Court has applied this principle repeatedly to invalidate state taxes whose legal *and* economic incidence necessarily fell on tribal activities taking place in Indian country — for example, a state income tax on "a reservation Indian whose entire income derives from reservation sources"

(*McClanahan*, 411 U.S. at 165), or a tax on a tribe's royalty interests in reservation oil and gas leases (*Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 761 (1985)), or a tax on the sale of cigarettes on the reservation "to tribal members for their own consumption." *Milhelm Attea*, 114 S. Ct. at 2031.[7] These decisions followed from the notion of Indian sovereignty that underlies the Court's analysis in this area, for all of the challenged taxes infringed to some degree "'on the right of reservation Indians to make their own laws and be ruled by them.'" *White Mountain Apache*, 448 U.S. at 142, quoting *Williams* v. *Lee*, 358 U.S. 217, 220 (1959). See *McClanahan*, 411 U.S. at 172. After all, a state tax on reservation sales *by* the tribe *to* tribal members who are the recipients of tribal services could "interfere with internal governance" (*Duro* v. *Reina*, 495 U.S. 676, 686 (1990)) by regulating the relationship between the tribal entity and its members; direct taxation of tribal income derived from the exploitation of on-reservation tribal resources could impose potentially ruinous liability and threaten to displace the mechanisms of tribal self-government.

But the rule against direct taxation of a tribe's on-reservation activities has not been stated in absolute terms. It is, instead, a "*presumption* against jurisdiction" (*Sac and Fox*, 113 S. Ct. at 1990 (emphasis added)) under which "Indian tribes and individuals *generally* are exempt from state taxation within their own territory." *Blackfeet Tribe*, 471 U.S. at 764 (emphasis added). See *White Mountain Apache*,

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[7] See also *Sac and Fox*, 113 S. Ct. at 1990-1993 (income tax, and excise tax and registration fees on vehicles, imposed on Indians in Indian country); *Potawatomi*, 498 U.S. at 507 (tax on sale of cigarettes in Indian country to tribal members); *Colville*, 447 U.S. at 162-164 (taxes on motor vehicles owned by tribes or their members); *Bryan* v. *Itasca County*, 426 U.S. 373, 375-377 (1976) (personal property tax on on-reservation mobile home); *Moe*, 425 U.S. at 480-481 (personal property tax on reservation property, license fee on Indian retailers doing business on the reservation, and tax on on-reservation sales of cigarettes by Indians to Indians).

448 U.S. at 144 ("state law is *generally* inapplicable") (emphasis added); *Duro*, 495 U.S. at 686 ("[w]e have held that States may not impose *certain* taxes on transactions of tribal members on the reservation") (emphasis added). For its part, *McClanahan*, the fountainhead of the Court's doctrine, based its holding on particular treaty language (see 411 U.S. at 173-177) and, even so, stated its rule as applicable only to taxes on Indian *lands* or *income*. Indeed, the Court later expressly stated that its holdings invalidating state taxes did *not* extend to levies on the receipts of reservation retailers that were "attributable to on-reservation sales to non-Indians." *Moe*, 425 U.S. at 482.

b. As this discussion suggests, respondent's argument (see Br. in Opp. 21-25) that state taxation of Indian tribes is entirely precluded unless in terms permitted by Congress cannot bear scrutiny. It is true that the bar on state *taxation* of Indians, like the parallel restraint on state *regulation* of reservation activities, was once understood to be absolute; that is because the decisions first recognizing Indian tax immunity, *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867), and *The New York Indians*, 72 U.S. (5 Wall.) 761, 770 (1867), simply "extended" the *Worcester* rationale "to state taxation within the reservation." *McClanahan*, 411 U.S. at 169. See *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 602 (1943) (*Worcester* principle "was carried into the tax field in *The Kansas Indians*, 5 Wall. 737, and for the same reasons"). While the Court occasionally has cited these nineteenth century decisions in modern times (see *Blackfeet Tribe*, 471 U.S. at 764), the broadest implications of the early holdings necessarily cannot survive the demise of the *Worcester* rule.

In later years the Court changed course, grounding Indian tax immunity, "not on the Indian sovereignty doctrine," but rather on the theory that tribal lands and enterprises were federal instrumentalities. *McClanahan*, 411 U.S. at 169-170. See *Colville*, 447 U.S. at 183-184 n.8 (opinion of Rehnquist,

J.). But that approach also "did not survive" (*Mescalero Apache* v. *Jones*, 411 U.S. at 150), and the Court more recently has "decline[d] the invitation to resurrect the expansive version of the intergovernmental immunity doctrine that has been so consistently rejected in modern times." *Id.* at 155. See *Colville*, 447 U.S. at 183-184 n.8 (opinion of Rehnquist, J.) (as applied to Indians, federal instrumentality "line of analysis * * * was later overruled"); *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U.S. 342 (1949); *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. at 603 (the "federal instrumentality theory has been renounced" in the Indian setting).

In its contemporary decisions, the Court has grounded Indian tax immunities on the more general principles that govern all assertions of state authority affecting reservation activities. The Court thus has explained that it has "held that States may not impose certain taxes on transactions of tribal members on the reservation because this would interfere with internal governance and self-determination." *Duro*, 495 U.S. at 686. See *Bryan* v. *Itasca County*, 426 U.S. 373, 376 n.2 (1976) (invoking "general preemption analysis"). To be sure, the Court has "recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case." *Cabazon Band*, 480 U.S. at 215 n.17.[8] But this generalization — with which we agree — hardly justifies tax

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[8] In *Cabazon Band*, 480 U.S. at 215 n.17, the Court observed in a footnote that "[i]n the special area of state taxation on Indian tribes and tribal members, we have adopted a *per se* rule." But *Cabazon Band*, which was not a case involving state taxation and which relied for its observation on *Blackfeet Tribe* and *McClanahan*, cannot be read as approving preemption of state law in the circumstances of this case. Certainly, the statement that "it is unnecessary to rebalance these [state and tribal] interests in every case" does not mean that *all* state taxes falling on tribes are invalid in *all* circumstances.

immunity when it is demonstrated in a particular case that the state interest supporting the levy is *compelling*, that the tribal interest is *insubstantial*, and that the state tax would have no effect on "tribal governance and self-determination."

c. Nor is there any congressional policy that requires general use of a *conclusive* presumption against the validity of a State's taxation of tribal activities. There is nothing magical in the imposition of a state tax's legal incidence, and a concomitant state-created legal obligation, on a tribe; this Court already has held, in the *Moe-Colville* line of cases, that tribes may be subjected to a legal obligation to collect and remit state taxes. By the same token, there is not, of course, any federal statute that broadly grants tax exempt status to Indians in all circumstances.[9] And although the Court has noted the congressional goals of "encouraging tribal self-sufficiency and economic development" (*Cabazon Band*, 480 U.S. at 216; see *New Mexico* v. *Mescalero Apache*, 462 U.S. at 335), a state tax is not invalid simply because it affects the tribal treasury. To the contrary, the Court has expressly rejected the argument that state legislation is preempted whenever it has an "adverse effect on the Tribe's finances" (*Cotton Petroleum*, 490 U.S. at 187) — even where "the economic impact" on the Tribe "is particularly severe." *Colville*, 447 U.S. at 151 n.27. See also *id.* at 156-157. Similarly, it is plain that a state tax on particular activities is

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[9] To the contrary, Congress on occasion has explicitly authorized state taxation of Indian activities or lands. See *McClanahan*, 411 U.S. at 177 n.16. And lest it be thought that the existence of these statutes suggests a background congressional view that state taxes are preempted unless explicitly permitted (cf. *id.* at 177), Congress also has specifically *precluded* the application of certain state taxes to specified activities or holdings of particular tribes — including taxation of lands held by members of the Chickasaw Nation or of the other Five Civilized Tribes. See, *e.g.*, Act of June 28, 1898, 30 Stat. 495, 505-513; Act of April 26, 1906, 34 Stat. 137, 144; Act of May 10, 1928, 45 Stat. 495, §§ 3, 5 (1928); Act of Jan. 27, 1933, 47 Stat. 777.

not preempted simply because, as a practical matter, it precludes the imposition of a tribal tax on the same conduct. See *id.* at 154-159.

In fact, in the particular setting presented here, it is plain that the State's authority to tax is wholly *consistent* with — and, indeed, is expressly *permitted* by — federal enactments. The Hayden-Cartwright Act, 4 U.S.C. § 104, explicitly authorizes States to collect taxes on the sale of motor fuel in federal reservations, providing:

> That all taxes levied by any State * * * upon, or with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through * * * filling stations [or] licensed traders, * * * located on United States military or other reservations, when such fuels are not for the exclusive use of the United States.

Four months after the statute's enactment, the Attorney General concluded that the reference to "reservations" in the Hayden-Cartwright Act "'describe[s] any body of land, large or small, which Congress has *reserved* from sale for any purpose. It may be a military reservation, *or an Indian reservation*, or, indeed, one for any purpose for which Congress has authority to provide * * *.'" 38 Op. Atty. Gen. 522, 524 (1936) (first emphasis in original), quoting *United States* v. *Celestine*, 215 U.S. 278, 285 (1909). See *ibid.* ("some of the agencies [selling fuel] which are expressly designated in [the Act] apparently are such as usually pertain to military, naval, or Indian reservations"). And four years later, speaking to precisely the situation at issue here, Solicitor of the Interior Margold concluded that the Act authorizes state taxation of sales of motor fuel purchased by an on-reservation tribal enterprise for resale both to non-Indians and to members of the tribe. *Application of Federal and State Sales Taxes to Activities of Menominee Indian*

Mills, 57 Interior Dec. 129, 138-140 (1940). There is no reason to doubt that conclusion, particularly since Congress reenacted the Act in 1947 — seven years after Solicitor Margold issued his opinion — without any relevant change. 61 Stat. 644.[10]

3. Sales By The Tribe Are Subject To The Oklahoma Fuel Tax. a. These principles make clear that Oklahoma's fuel tax may validly be applied to respondent's sales. At the outset, the Hayden-Cartwright Act expressly authorizes the tax. There should be no doubt, as the Attorney General concluded in 1936, that the Act reaches sales of motor fuel on all lands reserved by the United States for any purpose. That plainly reaches the federal trust lands that are the sites of the sales at issue in this case. See *Sac and Fox*, 113 S. Ct. at 1991-1992.[11]

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[10] In *White Mountain Apache*, 448 U.S. at 152 n.16, the Court reserved the question whether the Hayden-Cartwright Act applies to Indian reservations. But even apart from the Act's broad language, there are compelling reasons to believe that it does. As the Solicitor of the Interior noted, the Act was an amendment to the Federal Aid Highway Act of 1936, which also included "a section devoted to roadways in Indian reservations[,] indicating that attention was called in the consideration of the act to Indian reservations." 57 Interior Dec. at 139. In addition, among the selling agencies specifically enumerated as subject to tax are "licensed traders," a reference that is "particularly suggestive of Indian reservations." *Ibid.*

[11] Oklahoma did not assert the Act in defense of its tax in the lower courts because it was of the view that "the relevant boundary for taxing jurisdiction is the perimeter of a formal reservation, not merely land set aside for a tribe or its members." *Sac and Fox*, 113 S. Ct. at 1991. The State therefore viewed Chickasaw lands as indistingushable for fuel tax purposes from other lands; because Chickasaw lands were seen as within the State's taxing jurisdiction, they were seen as outside the scope of the Hayden-Cartwright Act. But the Court's decision in *Sac and Fox*, issued after the State filed its brief in the court of appeals, rejected the State's position — and therefore implicitly made clear that the Act applies to Indian country.

Even apart from the Act, however, there is no principle of preemption or tribal sovereignty that precludes application of the tax. So far as we are aware, the Court has *never* invalidated a state tax in the circumstances here: where the economic burden of the tax falls on purchasers who are *non-Indians* or *non-members* of the Tribe; where the State undeniably could impose the tax directly on those purchasers — and could, under *Milhelm Attea*, *Potawatomi*, *Colville*, and *Moe*, require the Tribe to collect and remit the tax; and where use of the product sold generates costs that are imposed entirely upon the *State*. Indeed, as we note above, the Court has declared that the rule against state taxation does not reach just that situation, emphasizing that its holdings invalidating state levies on Indian income did not address claims "that the State could not tax that portion of the receipts attributable to on-reservation sales to non-Indians." *Moe*, 425 U.S. at 482.[12] See also *Colville*, 447 U.S. at 178 (opinion of Rehnquist, J.) ("[h]istorically this Court had found Indians to be exempt from taxes on Indian ownership and activity confined to the reservation *and not involving non-Indians*") (emphasis added).

The reason is apparent. Aside from its naked interest in raising revenue, the Tribe has no significant stake here. After all, requiring a tribe to remit a tax on sales to non-members — a tax that will be used to meet costs imposed *on the State* by use of the goods sold — in no sense imposes a

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[12] The Court in *Moe* was addressing *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965), where the Court invalidated a state gross proceeds or income tax imposed on an on-reservation Indian trader. The Court noted that the "challenge to these [taxes] is limited to the State's attempt to apply them to gross income from sales made on the reservation to reservation Indians." *Id.* at 686 n.1. That was so even though the legal incidence of the tax on sales to *non-Indians* plainly fell on the Indian trader. The tax immunity of licensed Indian traders is generally equivalent to that of Indians themselves. See *Milhelm Attea*, 114 S. Ct. at 2036.

"burden which frustrates tribal self-government." *Moe*, 425 U.S. at 483. To the contrary, it is difficult to see how such a tax has any bearing whatsoever on the tribes' ability "to control their own internal relations, and to preserve their own unique customs and social order." *Duro*, 495 U.S. at 685-686. Indeed, any argument that immunity from the levy "is necessary to * * * tribal government is refuted" by the fact that the State historically assessed the tax and the Tribe until very recently paid it, so "that the parties to this case had accommodated themselves to the state regulation." *Montana* v. *United States*, 450 U.S. at 564-565 n.13.

Moreover, the tax at issue here does not fall upon *any* value generated by Indians on Indian land. Instead, this is the paradigm of a case in which the Court has indicated that there is *no* tribal interest supporting immunity from state law: the tax falls on "on-reservation sales outlets which market to non-members goods not manufactured by the tribe or its members, in which the tribal contribution to [the] enterprise is *de minimis*." *New Mexico* v. *Mescalero Apache*, 462 U.S. at 341. See *Cabazon Band*, 480 U.S. at 219 (noting minimal tribal interest where the tribe "merely import[s] a product onto the reservation for immediate resale to non-Indians").

As the Court has explained in very similar circumstances:

> It is painfully apparent that the value marketed by the [retailers] to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest. * * * What the [retailers] offer these customers, and what is not available elsewhere, is solely an exemption from state taxation.

Colville, 447 U.S. at 155. And the Court has repeatedly "rejected the proposition that 'principles of federal Indian law, whether stated in terms of preemption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who

would normally do their business elsewhere.'" *Milhelm Attea*, 114 S. Ct. at 2035, quoting *Colville*, 447 U.S. at 155.[13]

c. While the Tribe has no substantial interest in avoiding the tax, the State has a compelling interest in imposing it, for the sale and use of motor fuel "has a significant impact beyond the limits of" Indian country. *Rice*, 463 U.S. at 724. "This is not a case in which the State has nothing to do with the on-reservation activity, save to tax it" (*Cotton Petroleum*, 490 U.S. at 186), or where it is impossible "to identify any regulatory function or service performed by the State that would justify the assessment of taxes." *White Mountain Apache*, 448 U.S. at 148-149. To the contrary, it is the existence of state-funded public highways that makes possible the Tribe's sale of fuel, while the use of that fuel requires considerable expenditures for the maintenance and construction of state roads. "This particular 'spillover' effect is qualitatively different from any 'spillover' effects of income taxes or taxes on cigarettes. 'A State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention.'" *Rice*, 463 U.S. at 724, quoting *New Mexico* v. *Mescalero Apache*, 462 U.S. at 336. And here — in contrast to other

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[13] After the decision below, the Tribe imposed its own tax on gasoline and diesel fuel that is roughly equivalent to that imposed by the State. See Tribal Law 11-011 (Aug. 11, 1994). That the Tribe is not now marketing its tax exemption by undercutting other retailers, however, does not mean that it — or Oklahoma's many other tribes — will not do so in the future. In any event, even if the Tribe does not lower its prices, the tax exemption nevertheless is valuable only because it allows for imposition of a tribal tax that otherwise would not be feasible. See *Colville*, 447 U.S. at 154-159. Yet the State "'does not infringe the right of reservation Indians 'to make their own laws and be ruled by them,' *Williams* v. *Lee*, 358 U.S. 217, 220 (1959), merely because the result of imposing its taxes will be to deprive the Tribes of revenues which they currently are receiving." *Colville*, 447 U.S. at 156.

cases in which state taxes have been invalidated (see *White Mountain Apache*, 448 U.S. at 150) — the Tribe does *not* construct or maintain highways for the use of the general public; that burden falls entirely on the State.

As the district court recognized:

> In Oklahoma the gasoline transported onto Indian Country is for resale only and is used almost exclusively off of Indian Country on State jurisdiction roads. * * *
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> Further, the Tribe does not construct or maintain roads and highways for the use of the general public in Oklahoma. The State of Oklahoma constructs and maintains 111,412.76 miles of streets, roads and highways in Oklahoma which is funded by the state tax on motor fuel. All of the road mileage maintained by the state is off Indian Country. Therefore, the gasoline tax used to maintain these roads is directed at off-reservation value where the taxpayer is receiving State services, whether the taxpayer is a tribal member or not.

Pet. App. 36a-37a.

It should be added that the magnitude of the State's interest here is brought home by a consideration of the practical effects of the decision below. The motor fuel tax is a very significant source of revenue for Oklahoma, producing more than $300 million annually, almost all of which is devoted to road construction and maintenance. Under the court of appeals' rule, the taxes forgone on sales by respondent — and by Oklahoma's 40 other tribes — would be substantial. But that will not be the extent of the State's loss; "marketing" of the tax exemption by the tribes will take business (and therefore taxable sales) from non-Indian retailers, further diminishing tax revenue. The amounts involved surely will be significant since, as *amicus* Petroleum Marketers Association of America, *et al.*, demonstrates, the market for motor fuel is extraordinarily price sensitive. Cf.

Milhelm Attea, 114 S. Ct. at 2031 (purchases of untaxed cigarettes by non-Indians cost State $65 million in annual revenue).[14] Tax immunity therefore gives the tribes an enormous windfall, while leaving the State with few of the revenues but all of the burdens flowing from the sale and use of motor fuel.

The court of appeals accordingly erred in holding that "the district court's balancing of the respective tribal and state interests at stake was not relevant to the determination of the propriety of the fuel taxes." Pet. App. 16a. Instead,

> [w]hile the Tribes do have an interest in raising revenue for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

Colville, 447 U.S. at 156-157. Under this test, the proper accommodation here is manifest.

4. The Decision Below Rests On A Formalism That Disregards Economic Realities. In these circumstances, the holding below, which invalidates the fuel tax simply because the legal incidence is said to fall on the Tribe, rests upon the most sterile formalism. It is indisputable that the State could impose precisely the same burden on the Tribe by declaring the tax to fall on the consumer and directing the Tribe to

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[14] This is a particular problem in Oklahoma because it is home to many tribes; in addition, the history of Oklahoma allotments means that Indian country is scattered helter skelter across the State, so that purchasers of fuel always are likely to be near an Indian retailer. See generally *Sac and Fox*, 113 S. Ct. at 1987, 1993; *Woodward* v. *DeGraffenried*, 238 U.S. 284 (1915); M. Wright, *A Guide to the Indian Tribes of Oklahoma* (1971).

collect and remit the levy. See pages 17-18, *supra*. In the court of appeals' view, then, "the only difference between" a constitutional tax and one that is invalid is "their names." *Sac and Fox*, 113 S. Ct. at 1993.

If this defect may be cured simply by declaring in the text of the tax statute that the legal incidence falls on the consumer, as the court below appeared to suggest (Pet. App. 13a), its decision "has no relationship to economic realities. Rather it stands only as a trap for the unwary draftsman." *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). And as this case illustrates, the trap would be a significant one. The Oklahoma statute does not, after all, "expressly declare the legal incidence of the taxes to be on the retailer" (Pet. App. 13a), and the State consistently has understood the incidence of the tax to fall on the consumer. That the court of appeals nevertheless found the incidence of the tax to rest on the Tribe — and that the Tribe is entitled to a tax exemption as a result — is sure to foment litigation, as other tribes across the country attempt to convert arguable statutory ambiguities into tax immunities.

Moreover, the possibility that States could withdraw those exemptions after the fact by changing the statutory language is not a complete solution to this problem, because Indian sovereign immunity would prevent recovery by the States of forgone tax revenues. See *Potawatomi*, 498 U.S. at 509-511.[15] And such a change would not be a permanent solution either, because a tribe could chase the tax exemption up the distribution chain by the simple expedient of becoming distributors of fuel. The court of appeals' rule, like all

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[15] Of course, if the immunity conferred by the court of appeals could not be eliminated with the stroke of a pen, the ultimate constitutionality of a State's tax regime would turn on "mere nomenclature." *Colville*, 447 U.S. at 163-164. Such an approach could impose crippling burdens on state governments.

formalisms, thus would invite gamesmanship and manipulation.

The decision below therefore departs from this Court's clear holdings: "[t]here is of course no question that the Court has discarded the controlling significance of the label a State attaches to its taxes. A tax instead must be judged by its 'practical operation.'" *Colville*, 447 U.S. at 188 (opinion of Rehnquist, J.), quoting *Detroit* v. *Murray Corp.*, 355 U.S. 489, 492 (1958).[16] And because "[t]here is no economic consequence that follows necessarily from the use of * * * particular words, * * * and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect" (*Complete Auto*, 430 U.S. at 288), the court of appeals' approach entirely divorces Indian tax immunity from its rationale, leaving it as an engine for the destruction of the state fisc. This is a matter of the greatest significance to the States, for "[i]t is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments." *Dows* v. *City of Chicago*, 78 U.S. (11 Wall.) 108, 110 (1871). The holding below therefore is manifestly wrong as it applies to sales by the Tribe to non-members.

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[16] The Court has found the legal incidence of the tax to be controlling in one circumstance: when a state levy falls directly on the United States. That is because the Federal Government's immunity from state taxation "has taken on essentially symbolic importance, as the visible 'consequence of that [federal] supremacy which the constitution has declared.'" *United States* v. *New Mexico*, 455 U.S. 720, 735 (1982), quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 436 (1819). That rationale has no application to the relationship between States and Indian tribes, however. The United States, as the "suprem[e]" sovereign, is wholly immune from state regulation and taxation. In contrast, the rules of Indian sovereignty are adjusted to accommodate state interests. See pages 14-18, *supra*. That has become particularly clear with the Court's rejection of the notion that tribal enterprises are federal instrumentalities. See pages 20-21, *supra*.

5. The State May Tax Sales Of Fuel Used By Tribal Members Outside Indian Country. While we therefore think it plain that Oklahoma's tax may be imposed on sales to non-members, we also submit that the tax may be applied to sales to members of the Tribe. As Solicitor of the Interior Margold explained, the Hayden-Cartwright Act must be read to make such sales taxable

> in view of the purpose of the statute to permit State taxes of all sales on reservations not previously subjected to such taxes, and of the wording of the statute, permitting taxes to be levied "in the same manner and to the same extent" as upon sales outside the reservation. Indians making purchases of gasoline outside the reservation must pay the sales tax in the same manner as other persons.

57 Interior Dec. at 140.

But even apart from the Hayden-Cartwright Act, in the circumstances of this case there is no justification for granting the Tribe immunity from tax on sales to tribal members. Because the Tribe does not maintain public highways, motor fuel purchased by tribal members is used almost exclusively on state jurisdiction roads, and therefore imposes precisely the same burdens upon the State as does the use of fuel by non-members. As the district court correctly held, "the gasoline tax used to maintain these roads is directed at off-reservation value where the taxpayer is receiving State services, whether the taxpayer is a tribal member or not." Pet. App. 37a. These extra-reservation effects of the taxed activity decisively distinguish this case from those (involving cigarette, personal property, and income taxes, see pages 18-19 & n. 7, *supra*) in which the Court has invalidated taxes on tribal members; as the Court has explained, the "'spillover' effect [here] is qualitatively different from any 'spillover' effect of income taxes or taxes on cigarettes." *Rice*, 463 U.S. at 724.

In fact, in analogous circumstances the Court has recognized that a state tax may be imposed on tribal members who live in Indian country. In both *Sac and Fox* and *Colville*, the Court suggested that automobile excise taxes and registration fees may be imposed on tribal members who live (and presumably garage their vehicles) in Indian country, so long as the amount of the tax is tailored to use of the vehicle off of Indian country. See *Sac and Fox*, 113 S. Ct. at 1993; *Colville*, 447 U.S. at 163-164. That conclusion, which rests on the understanding that a State must be able to tax recipients of its services, validates a tax on the purchase of fuel by tribal members that is "used almost exclusively off of Indian Country on State jurisdiction roads." Pet. App. 36a.

B. The Legal Incidence Of The Fuel Tax Falls Upon The Consumer

For the reasons set out above, Oklahoma's power to impose the motor fuel tax on sales by the Tribe should be upheld regardless of who bears the legal incidence of that tax. But if the Court rejects that proposition and concludes that the legal incidence of a state tax never may be imposed on an Indian tribe absent express congressional intent (and concludes further that the Hayden-Cartwright Act does not provide that consent), the decision below regarding the fuel tax still should be set aside. The essential foundation for the court of appeals' holding — the conclusion that the legal incidence of the tax falls on the retailer — is incorrect. That conclusion disregarded both this Court's precedents on the placement of a tax's legal incidents and manifest indications of the Oklahoma Legislature's intent.

1. As the concept has been understood by this Court, the legal incidence of a tax does not necessarily fall on the entity that must remit the tax, or that can be held legally liable for nonpayment; instead, the legal incidence is borne by the entity that the legislature intended to carry the burden of the tax in a practical sense. This central role of legislative

intent comes clear from this Court's decisions, including its discussion of the factors that are *not* dispositive of the legal incidence inquiry. The Court thus has "squarely rejected the proposition that the legal incidence of a tax falls always upon the person legally liable for its payment." *United States* v. *Mississippi Tax Comm'n*, 421 U.S. 599, 607 (1975). Similarly, although the legal incidence of a sales tax will fall on the consumer when there is a statutory requirement that the retailer pass it on (see, *e.g.*, *Moe*, 425 U.S. at 481-482), that will be so even when the statute does not contain any mechanism for enforcing the pass-through requirement.[17] And when the legislature intends that the tax be passed on, the consumer to whom it *is* passed on may bear the levy's legal incidence even if he or she is not subject to suit by the State (or by the vendor) for nonpayment; none of this Court's decisions addressing the issue has suggested that legal provisions subjecting the consumer to legal liability are essential to a determination that the consumer bears the legal incidence of the tax.

Nor, for that matter, is an *express* pass-through requirement necessary. As this Court explained when rejecting a tribal claim of immunity from a state tax requiring payment by the tribe:

> None of our cases has suggested that an express statement that the tax is to be passed on to the ultimate purchaser is necessary before a State may require a tribe to collect * * * taxes from non-Indian purchasers and remit the amounts of such tax to the State. Nor do our

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[17] See *Mississippi Tax Comm'n*, 421 U.S. at 609 n.8 (rejecting contention that, because the statute does not sanction the vendor for failing to pass on the tax, the legal incidence falls on the vendor); *First Agricultural Nat'l Bank* v. *State Tax Comm'n*, 392 U.S. 339, 348 (1968) ("We cannot accept the reasoning of the court below that simply because there is no sanction against a vendor who refuses to pass on the tax (assuming this is true), this means the tax is on the vendor.").

> cases suggest that the only test for whether the legal incidence of such a tax falls on purchasers is whether the taxing statute contains an express "pass on and collect" provision.

Chemehuevi Indian Tribe, 474 U.S. at 11. Instead, the Court explained, "the test to be derived from [our] cases * * * is nothing more than a fair interpretation of the taxing statute as written and applied." *Ibid.* So long as the statute, "fairly interpreted," reveals a legislative intent that the consumer bear the ultimate burden of the tax, the legal incidence is on the consumer. See generally *First Agricultural Nat'l Bank* v. *State Tax Comm'n*, 392 U.S. 339, 347 (1968) ("[t]here can be no doubt from the clear wording of the statute that the Massachusetts Legislature intended that this sales tax be passed on to the purchaser"); *Gurley* v. *Rhoden*, 421 U.S. 200, 205 (1975) (legislative "purpose" dispositive).

A "fair interpretation" of Oklahoma's motor fuel tax leaves no doubt that the Oklahoma legislature intended the consumer (and certainly *not* the retailer) to bear the burden of the fuel tax.[18] Thus, the basic definitional elements of the motor fuel tax code — which were wholly ignored by the court below — refer to the requirement that "a distributor, dealer, or *retailer* * * * *collect* taxes levied by this act." Okla. Stat., Tit. 68, § 501C (emphasis added). This makes

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[18] Although the "legal incidence" inquiry touches on a matter of state law and this Court often defers to the views of the courts of appeals on such matters, it is clear that when the determination of a tax's legal incidence affects a federal right to tax immunity, "the duty rests on this Court to decide [such issues] for itself." *Mississippi Tax Comm'n*, 421 U.S. at 609 (citation omitted). The Court accordingly has not viewed as dispositive even *state court* pronouncements on where the legal incidence of a state tax falls. See, *e.g.*, *Diamond Nat'l Corp.* v. *State Board of Equalization*, 425 U.S. 268 (1976) (per curiam); *First Agricultural Nat'l Bank*, 392 U.S. at 346. Surely, the courts of appeals may claim no greater deference when interpreting state enactments than may the state courts themselves. See *Chemehuevi Indian Tribe*, *supra*.

plain that the obligation of both the distributor *and the retailer* is that of collecting the tax from someone further down the distribution chain.

This conclusion is confirmed by the exemptions that appear in virtually every one of the numerous provisions establishing the various constituents of the motor fuel tax. See Okla. Stat., Tit 68, §§ 501B, 502.2B, 502.3B, 502.4B, 502.5B, 502.6B, 502.7B, 522(d). These exemptions relieve the *consumer* of the obligation to pay the tax and are passed *up* the distribution chain to the retailer and then to the distributor. Thus, Section 501B (emphasis added) — again, a definitional provision of the statute — provides that "*[p]urchasers* of nontaxable diesel fuel must comply with the provisions of Section 509 [of this title] *in order to avoid the taxes* levied by Sections 502.1 and 522.1 [of this title]." Section 509B, in turn, provides that "[e]very person actually engaged in farming in Oklahoma or in a state which borders the State of Oklahoma and buying motor fuel to be used as fuel for farm tractors or stationary engines * * * and used exclusively for agricultural purposes * * * may purchase such motor fuel *without paying the tax.*" (emphasis added).[19]

The statute similarly declares that tax is not due on diesel fuel "used exclusively for purposes other than to operate motor vehicles on the public highways of this state" (Okla. Stat., Tit. 68, § 509.2A (1994)), and any person who places diesel fuel purchased under such an exemption "into the fuel tank of a motor vehicle for use in operating the motor vehicle on the public highways *shall be liable for the taxes.*" *Id.* § 509.2C (emphasis added). Fuel purchased by a county, city, or town for use in its vehicles is exempt from tax "provided that if the diesel fuel is placed directly into the fuel supply

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[19] The court of appeals itself cited this provision for the proposition "that the tax is not imposed on the distributor." Pet. App. 14a. We agree that the exemption does indeed stand for that proposition — and for the further proposition that the tax *is* imposed on the consumer.

tank or tanks of the motor vehicle by the supplier, certification must be made on the invoice and all such sales must be reported by the supplier on forms furnished by the Oklahoma Tax Commission." *Id.* § 509.2(F). The statute provides similar exemptions to those purchasing fuel for use in specified aircraft, in passenger buses or coaches, by public school vehicles, by FFA or 4-H club trucks, or by volunteer fire departments (*id.* §§ 508(a), 509.2E, 527). That these provisions relieve the *consumer* of the burden of "paying the tax" makes clear that the consumer ordinarily bears that burden, and thus the legal incidence of the levy. And this is confirmed by the practice when an exempt consumer purchases fuel from a retailer: the retailer subtracts from the consumer's invoice the tax ordinarily due on the sale and obtains a credit on its next purchase of fuel from the distributor.

It is true, as the court of appeals observed, that the tax "statutes nowhere require the amount of the tax to be included in the retail price at the pump, a requirement which we could interpret as imposing the tax on the consumer." Pet App. 13a. But, as mentioned above, this Court already has rejected a similar statutory interpretation that gave significance to the absence of "'any * * * *explicit* pass-through' language." *Chemehuevi*, 474 U.S. at 10, quoting 757 F.2d 1047, 1056 (9th Cir. 1985) (emphasis added by the Court). Just as important, the Oklahoma statute nowhere declares its legal incidence to fall on the *retailer*, makes the *retailer* legally liable for payment of the fuel taxes as a general matter, or requires the distributor to pass the taxes on to the *retailer*. Accordingly, if it is significant that the statute does not expressly require pass-through of the tax from the retailer to the consumer, it must be equally as significant that

the statute does not require pass-through of the tax from the distributor to the retailer.[20]

Finally, the provision principally relied upon by the court of appeals as evidence that the legal incidence of the tax falls on the retailer does not support its analysis. That provision, Okla. Stat., Tit. 68, § 505C, indicates that distributors remit taxes to the State "on behalf of a licensed retailer," and that a distributor who is unable to collect the tax from the retailer may deduct that amount from its future tax remittances. See Pet. App. 13a-14a. But the reference to "collection" suggests only that the legal incidence of the tax falls somewhere down the distribution chain from the distributor; it says nothing about whether that incidence comes to rest with the retailer rather than the consumer. Moreover, the portion of § 505C omitted by the court below from its opinion makes clear that, at a minimum, the retailer cannot always bear the legal incidence of the tax. The unabridged version of the relevant portion of Section 505C refers to "[m]otor fuel taxes remitted by a distributor on behalf of a licensed retailer [for] the distributor or *collected on behalf of a nonlicensed purchaser of motor fuel*" (emphasis added). The legislature therefore expressly contemplated a class of cases in which retailers do not play any role in paying or collecting the tax. The significant point for the legislature thus was that the distributor be able to pass on the tax, not that the tax be borne by a retailer. In these circumstances, the motor fuel tax, "fairly interpreted," imposes the legal incidence of the tax on the consumer.

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[20] Okla. Stat., Tit. 68, § 505E does provide that a retailer "shall, at its option, pay to the distributor * * * all taxes due on all diesel fuel purchased from distributors or may procure a distributor's license as provided in Section 510 of this title." This provision, which refers only to taxes on diesel fuel, contains no enforcement mechanism; it also says nothing about the requirement that the retailer of diesel fuel collect the tax from those below it on the distribution chain.

2. It should be added that if we are wrong in our definition of legal incidence — so that the legal incidence of a tax is borne only by those who are in some way subject to legal liability for payment of the tax — then the legal incidence of Oklahoma's fuel tax plainly falls on the *distributor*, rather than the retailer. While the Oklahoma Legislature doubtless expected that distributors *would* pass on the tax to retailers (just as it expected that retailers would pass it on to consumers), nothing in the statute *requires* them to do so. Similarly, as we note above, if the distributor does not pay the tax the State has no legal recourse against the retailer. See *Gurley*, 421 U.S. at 205-206 ("if the [distributor] does not pay the tax, the Government cannot collect it from his vendees; the statute has no provision making the vendee liable for its payment"). By the same token, the State has no right of action against a retailer who fails to compensate its distributor for taxes paid. In any event, then, the legal incidence of the tax here does not fall on the retailer, which means that the fuel tax is valid as applied to sales by tribal retailers.

II. THE TREATY WITH THE CHICKASAW NATION DOES NOT PRECLUDE IMPOSITION OF OKLAHOMA'S INCOME TAX ON TRIBAL MEMBERS WHO LIVE OUTSIDE INDIAN COUNTRY

The court of appeals also erred in holding that Oklahoma may not impose its income tax on enrolled members of the Chickasaw Nation who work on tribal trust lands but live outside the formal boundaries of Indian country. That decision rests on a plain misreading of the treaty with the Chickasaw Nation. We discuss first the framework for the court of appeals' decision, an understanding of which is critical to the issue presented here, and then proceed to demonstrate why the court's reading of the treaty is indefensible.

1. As we explain above (at 18-19), decisions such as *McClanahan* and *Mescalero Apache* v. *Jones* have recognized a strong presumption against state taxation of the reservation income of Indians who live on formal reservations and derive their income from reservation sources. Two Terms ago, in *Sac and Fox*, the Court extended this presumption to Indians who live in all areas defined as "Indian country" and who derive their income from work within that territory. The Court explained that it had "never drawn [a] distinction" between formal reservations and Indian country for purposes of the *McClanahan* presumption. 113 S. Ct. at 1991. Thus, the Court held that "[i]f the tribal members do live in Indian country," the relevant treaties and statutes would have to be analyzed, as in *McClanahan*, "against the backdrop of Indian sovereignty." *Id.* at 1992.

At the same time that it has recognized the presumptive income tax immunity of reservation Indians, however, the Court has contrasted the status of "Indians who have left or never inhabited reservations set aside for their exclusive use," as to whom no such presumption applies. *McClanahan*, 411 U.S. at 167. The Court in *Sac and Fox* thus reaffirmed that "[t]he residence of a tribal member is a significant component of the *McClanahan* presumption against state tax jurisdiction." 113 S. Ct. at 1991. In the context of *Sac and Fox*, where the State sought to apply its income and motor vehicle excise taxes to members of the Tribe who lived in Indian country (see *id.* at 1988-1989), this statement reflected the Court's continuing recognition of the distinction between Indians who live on land set aside for them by the United States, and those who do not. See also *id.* at 1991 ("To determine whether a tribal member is exempt from state income taxes under *McClanahan*, a court first must determine the residence of that tribal member.").

Because all of the Indians whom Oklahoma sought to tax in *Sac and Fox* may have lived within Indian country, the Court had no occasion to determine whether the Tribe's

"right to self-governance could operate independently of its territorial jurisdiction to preempt the State's ability to tax income earned from work performed for the Tribe itself when the employee does not reside in Indian country." 113 S. Ct. at 1992. In addressing that question, the court below held that no presumption of invalidity applies to state income taxes on Indians living outside Indian country, but that a state nevertheless may be prohibited from imposing such taxes if "the tribe [can] show that the tax is barred by one of the two independent barriers to the exercise of state jurisdiction over Indians, *i.e.* interference with reservation self-government or impairment of rights granted or reserved by federal law." Pet. App. 26a-27a. While petitioner has no quarrel with this statement in the abstract, the court's construction of the treaty with the Chickasaw — which it held to create such an independent bar to taxation — is insupportable.

2. The court of appeals relied on Article IV of the treaty, which provides:

> The Government and the people of the United States are hereby obliged to *secure to the said [Chickasaw] Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants*; and that no part of the land granted them shall ever be embraced in any Territory or State; but the U.S. shall forever secure said [Chickasaw] Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.

Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333.[21] The court focused in particular on the language providing that "no Territory or State shall ever have [the] right to pass laws for the government of the [Chickasaw] Nation," reading this language to mean that "[t]he crucial question in determining the validity" of Oklahoma's tax is simply "whether the law is one imposed on the Chickasaw Nation or its descendants." Pet. App. 30a. Under this analysis, "[r]esidency is simply not relevant." *Ibid.* All that matters is whether the law — although facially neutral as between Indians and non-Indians — is being applied to members of the Tribe. If so, in the court of appeals' view, the law is one "for the government of the Chickasaw Nation" and is invalid.

This approach does violence to the plain terms of the treaty, which precludes the State from "pass[ing] laws for the *government* of the [Chickasaw] Nation" (emphasis added). In light of the *McClanahan* presumption, this language may reasonably be read as barring state laws that govern the Chickasaw in a manner that displaces the mechanisms of tribal government in Indian country. But it cannot fairly be stretched to proscribe a non-discriminatory state income tax imposed on persons living outside of Indian country, who receive from the State both a myriad of particular services and "[t]he intangible value of citizenship in an organized society." *Cotton Petroleum*, 490 U.S. at 190. One would not, after all, characterize a state income tax imposed on a federal employee who lives within the State's jurisdiction as a law passed "for the government of the United States."

That point is conclusively established by the treaty language immediately preceding that relied upon by the court

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[21] As we have explained (at note 1, *supra*), this treaty actually was concluded with the Choctaw Nation but subsequently was applied to the Chickasaw Nation.

of appeals. Read in context, the treaty provides that the "United States are hereby obliged to secure to the said [Chickasaw] Nation of Red People the jurisdiction and government of all persons and property *that may be within their limits west, so that* no Territory or State shall ever have the right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants" (emphasis added). This provides expressly that the agreement confers rights to the Tribe "within their limits" (what we would now call the reservation, trust land, or Indian country); the conferral of these rights "so that" state laws may not be passed for the Tribe makes clear that the treaty has effect only within Indian country.

It may be added that the imposition of a tax on someone living *outside* Indian country is not rendered a law "for the government of the Chickasaw Nation" "within their limits west" simply because the income subject to tax is earned in Indian country. The tax here is not imposed upon the payment of funds *by* the tribal government in Indian country; it falls, instead, upon individual members of the Tribe who reside outside of Indian country. See *United States* v. *County of Fresno*, 429 U.S. 452, 461 n.9 (1977) ("The theory * * * that a tax on income is legally or economically a tax on its source, is no longer tenable") (citation omitted).[22] By declaring that the residence of that tribal member "is simply not relevant" (Pet. App. 30a), the court of appeals therefore

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[22] A tax on tribal members who live outside but work within Indian country is in this respect identical to a tax on *non-members* who work for the Tribe. The latter tax, as the court of appeals itself recognized, plainly is valid. Pet. App. 21a. Cf. *Cotton Petroleum*, *supra* (state could impose severance tax on on-reservation oil and gas drilling by non-member company, where tax did not affect tribal interests and company derived substantial benefits from the state). In both instances, the legal and economic incidence of the tax falls on the individual taxed, not the entity by whom the individual is employed. See *County of Fresno*, 429 U.S. at 461 n.9.

necessarily has held that tax immunity is an entitlement conferred upon individual Chickasaws. While the court purported not to resolve the question (see *id.* at 30a n.11), this rule would seem to preclude the imposition of Oklahoma's income tax on all Chickasaw Indians who live outside Indian country, not just those who derive their income from work on the reservation. Indeed, taken to the limits of its logic, the court's analysis would preclude the imposition of *any* state law on members of the Tribe — including all the other laws of Oklahoma and the laws of other states when Chickasaw Indians journey beyond the borders of Oklahoma. The parties to this treaty surely cannot have intended to provide Chickasaw Indians with a blanket exemption from all state law. But if that is not what the treaty means, the holding of the court below is insupportable.

Moreover, the court of appeals' holding cannot be reconciled with the rule that Indians are "subject to nondiscriminatory state law otherwise applicable to all citizens of the State" when they travel beyond the reservation boundaries. *Mescalero Apache* v. *Jones*, 411 U.S. at 148-149. While that presumption may be overcome by "express federal law" (*ibid.*), the treaty language relied upon here hardly carries the necessary clarity. In fact, this Court has *never* found federal law sufficient to overcome the rule of *Mescalero Apache*. That is not surprising, for the interest of Indians in remaining "'free from state jurisdiction and control'" (*McClanahan*, 411 U.S. at 168 (citation omitted)) is most significant when "on-reservation conduct involving only Indians is at issue." *White Mountain Apache*, 448 U.S. at 144. See *Potawatomi*, 498 U.S. at 511.[23]

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[23] The court of appeals evidently found it significant that on-reservation Indian immunity from state regulation is stated more explicitly in the treaty with the Chickasaw than in the treaties addressed in *McClanahan* and *Sac and Fox*. See Pet. App. 27a-28a. Even if true, however, that observation hardly supports the court's conclusion. The tax at issue in

3. This understanding of the treaty is confirmed by the purposes of its draftsmen and the circumstances of its drafting. The guarantee of freedom from state laws "for the government of the Choctaw Nation," a guarantee subsequently applied to the Chickasaw Nation, must be understood in relation to language elsewhere in the treaty and to the other clauses in Article IV of the Treaty of Dancing Rabbit Creek. As explained in the preamble, the treaty was necessitated by the State of Mississippi's extension of its laws to "persons and property" within the State's limits and the inability of the United States to guarantee the Choctaw (and Chickasaw) people freedom from those laws. See also Treaty with the Chickasaw, 7 Stat. 450 (1834). The United States therefore agreed to convey "a tract of country west of the Mississippi River, in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it." Treaty of Dancing Rabbit Creek, Art. II.

The land given to the Choctaw and Chickasaw Nations did not at that time lie within any State. And critically, Article IV promised that it never would: "No part of the land granted them shall ever be embraced in any State or Territory." Because they were to be outside the jurisdiction of any political unit (except the United States), other portions of Article IV gave the Chickasaw a significant degree of sovereignty within their lands. They were to be subject only to their own laws (so long as those laws were consistent with the Constitution and federal law) and to the exercise of federal power pursuant to the Indian Commerce Clause. This and similar treaties under which the Five Civilized Tribes removed to Indian Territory caused this Court to comment,

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McClanahan was invalidated because it fell upon a *reservation* Indian and therefore was (needless to say) subject to the *McClanahan* presumption; the Court *left open* whether the tax at issue in *Sac and Fox* could be applied to Indians living outside of Indian country.

prior to statehood, that the Territory stood "in an entirely different relation to the United States from other Territories, and * * * for most purposes it is to be considered as an independent country." *Atlantic and Pacific R. Co.* v. *Mingus*, 165 U.S. 413, 435-436 (1897).[24]

It is in this context that the first clause of Article IV must be read. The point of the treaty, after all, was *literally* to remove the Tribe from the jurisdiction of any State, and comcomitantly to grant the Tribe "the jurisdiction and government of all the persons and property *that may be within their limits west.*" Given the understanding that the Tribe's lands never would be within the jurisdiction of a State, it was quite natural for the treaty to provide that "no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation." In this setting, the drafters could not have meant to create state tax immunities for members of the Tribe who moved west of the Mississippi yet lived outside Indian country, because it was not thought that those members would live within a State.

The subsequent history of the territory that was conveyed to the Chickasaw further demonstrates that the court of appeals' interpretation of the treaty is untenable. As noted above, the treaty provided that this territory would never be embraced within any state. The Chickasaw Nation, as well as several of the other tribes that removed to Indian Territory, initially had fully functioning systems of government. See F. Cohen, *supra*, at 427. But as we also have explained (at 3-4), Congress substantially modified the guarantee that Indian lands would be free from state encroachment, first by extending certain laws of Arkansas to a portion of Indian Territory (Act of May 2, 1890, 26 Stat.

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[24] This relationship is further confirmed by the fact that the treaty granted the land in fee simple to the Chickasaw Nation "as a quasi independent nation," and was not to be held in trust by the United States. *Fleming* v. *McCurtain*, 215 U.S. 56, 60 (1909).

81), then by displacing tribal law (Act of April 28, 1904, 33 Stat. 573), allotting Chickasaw lands, enacting the Oklahoma Enabling Act that authorized the admission to the Union of the Oklahoma and Indian Territories as the State of Oklahoma (Act of June 16, 1906, 34 Stat. 267), and, finally, by admitting Oklahoma to the Union on November 16, 1907.

This Court has, on several occasions, observed that treaty rights "'must be read in light of * * * subsequent'" relevant legislation. *South Dakota* v. *Bourland*, 113 S. Ct. 2309, 2321 (1993) (quoting *Montana* v. *United States*, 450 U.S. 544, 561 (1981)). See also *Brendale* v. *Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, 422 (1989) (opinion of White, J.); *Puyallup Tribe* v. *Washington Game Dep't*, 433 U.S. 165, 174 (1977). In the case of the Chickasaw Nation, Acts of Congress subsequent to 1830 made it possible for members of the Tribe to reside within the State of Oklahoma on lands that no longer were subject to the obligations of the treaty. In these circumstances, "'[i]t defies common sense'" (*Brendale*, 492 U.S. at 423 (opinion of White, J.) (citation omitted)) to conclude that tribal members — who live in and receive services from Oklahoma — are exempted from state tax by the treaty.

CONCLUSION

The decision of the court of appeals for the Tenth Circuit should be reversed.

Respectfully submitted.

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Supreme Court of the United States

October Term, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

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QUESTIONS PRESENTED

1. Whether the court of appeals could have reasonably concluded that the legal incidence of Oklahoma's motor fuel tax falls upon the retailer of the fuel?

2. Whether, if the answer to the preceding question is "yes," and the retailer is a federally-recognized Indian tribe conducting business in Indian country, principles of federal preemption or Indian sovereignty preclude imposition of the state tax directly on the tribe?

3. Whether the Treaty of September 27, 1830, to which the Chickasaw Nation later became beneficiary by treaty, precludes state taxation of the income of Chickasaw tribal members who are employed by the government of the Chickasaw Nation within Chickasaw Indian country, but who reside outside such Indian country?

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STATEMENT OF THE CASE

1. Respondent Chickasaw Nation is a federally-recognized Indian tribe, which, as of the time of the arrival of the first Europeans in what is now the southern United States in the sixteenth century, occupied most of what is now western Tennessee, and portions of western Kentucky, northern Alabama and Mississippi.[1] ARRELL M. GIBSON, THE CHICKASAWS 4-6 (1970); JAMES H. MALONE, THE CHICKASAW NATION 29-51 (1922). From the earliest recorded times, the Chickasaw Nation practiced a form of democratic government. *Id.* at 38.

Having defended itself from French attacks in the mid-eighteenth century, GIBSON, *supra*, at 46-57, and attacks from various powers during the Revolutionary War, *id.* at 72-78, the Chickasaw Nation established friendly relations with the United States, Treaty of Jan. 3, 1786, arts. II, IV, 7 Stat. 21, 21-22. By the dawn of the nineteenth century, the power and sophistication of the Chickasaw, Choctaw, Cherokee, Creek,

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[1] In a misleading footnote in its Statement, the Tax Commission cites dictum from a half-century old decision of this Court to the effect that the Five Civilized Tribes have only "remnants" of tribal sovereignty, and that their members "have 'little to distinguish them from all other citizens.' " Pet. Br. 4 n.2. Also cited following that proposition is "F. Cohen, *supra*, at 429-30." *Id.* One page earlier in the Tax Commission's brief, it becomes clear that the "1971 edition" of FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW is the referent, which might lead this Court to conclude that such was the state of what are now known simply as the "Five Tribes" as recently as the 1970s. But there is no "1971 edition" of Cohen's *HANDBOOK*: rather, the document apparently cited by the Tax Commission is a photoduplicated reprint of the original *1942* edition thereof, published by the American Indian Law Center in 1971. It should not be surprising that only a few years following the adoption of the Oklahoma Indian Welfare Act of 1936, 49 Stat. 1967, tribal governments had not yet reached their modern levels of sophistication. Rather than leaving the Tax Commission's denigrating footnote 2 stand unaddressed, the Chickasaw Nation wishes to make clear that neither its sovereignty nor its citizenry has been reduced to indistinguishable remnants. The State of Oklahoma itself has entered into modern intergovernmental compacts with a number of Oklahoma's tribes – including the Chickasaw Nation.

and Seminole Nations (as well as increasing European cultural and political influence on those tribes) had resulted in the then-commonly-applied "Five Civilized Tribes" designation. Prior to the Louisiana Purchase in 1803 (and even subsequently, due to perceived Spanish threats from Florida and Texas to what was then the southwestern corner of the United States), the strategic importance of the lands occupied by the Chickasaw and Choctaw Nations continued to increase. *See, e.g.*, Samuel G. Wells, *Federal Indian Policy: From Accommodation to Removal*, *in* THE CHOCTAW BEFORE REMOVAL 185-86 (Carolyn K. Reeves ed., 1985).[2]

By 1818, responding to increasing non-Indian demands for land in the South, Secretary of War John C. Calhoun prepared to accelerate United States attempts at removal. Recognizing that simultaneous removal of all tribes would be impracticable,

> he preferred to begin with a large tribe that was known for its high level of economic, social, and political development. The successful removal of such a tribe would be prestigious and would force other Indian groups to consider their own removal to the West. No Indian nation could meet these requirements better than the Choctaws of Mississippi.

ARTHUR H. DEROSIER, JR., THE REMOVAL OF THE CHOCTAW INDIANS 46 (1970). Those efforts resulted in the Treaty of Oct. 18, 1820, 7 Stat. 210, by virtue of which the Choctaw Nation

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[2] During the War of 1812, the presence – not the absence – of the Choctaw Nation in the area proved of critical benefit to the United States. Having defeated forces from other Indian tribes allied with the British in the winter of 1813-14, a thousand Choctaw warriors, asked by Andrew Jackson to assist him at the Battle of New Orleans, distinguished themselves in battle, and were personally thanked by Jackson in the name of the United States. ARTHUR H. DEROSIER, JR., THE REMOVAL OF THE CHOCTAW INDIANS 35-36 (1970).

ceded about a fifth of Mississippi (while still retaining substantial lands therein) in exchange for what is now the southern half of Oklahoma, and additional land in what is now western Arkansas. *See* DeRosier *supra*, at 29 (providing map illustrating lands exchanged). The western Arkansas lands were later ceded to the United States, Treaty of Jan. 20, 1825, art. I, 7 Stat. 234, 234-35, leaving the Choctaws with lands comprising about 40% of Mississippi, and the southern half of what is now Oklahoma. DeRosier, *supra*, at 29.

By the election of 1828, Calhoun had served for twelve years as Secretary of War under President Monroe, and Vice President during the presidency of John Quincy Adams. During that period, "Calhoun's [removal] policy had countenanced bribery, threats, insulting language, and propaganda; but it had never used, or threatened to use, military force." *Id.* at 98. The Chickasaw and Choctaw Nations, which shared both a close cultural affinity, *see* Gibson, *supra*, at 4, and a common border running from the Mississippi River into northern Alabama, *compare id.* at 5 (Chickasaw boundaries) *with* DeRosier, *supra*, at 29 (Choctaw boundaries), maintained substantial strength, both by virtue of their extensive land holdings and substantial populations.[3] On May 22, 1828, a bill to forcibly remove the Choctaws, still targeted as the first major tribe to be removed, was defeated in the United States Congress. *See id.* at 96. But with the election of Andrew Jackson as President of the United States in November of that year (Calhoun was re-elected Vice President), Indian policy would shift to a more aggressive one favoring immediate removal. *Id.* at 99.

Even before Jackson's inauguration, on February 4, 1829, Mississippi adopted an act "to extend legal process into that part of the state now occupied by the Chickasaw and Choctaw tribes of Indians." 1824-1838 Miss. Laws 195. But

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[3] As of 1828, no more than fifty Choctaws had removed to the west. "Most estimates suggest fifteen, and one as few as eight." DeRosier, *supra*, at 98; *see also United States v. John*, 437 U.S. 634, 639 (1978).

> Jackson, in his first inaugural address, amazed his extremist friends by simply stating: "It will be my sincere and constant desire to observe toward the Indian tribes within our limits a just and liberal policy, and to give . . . humane and considerable attention to their rights and their wants. . . . "

DEROSIER, *supra*, at 101. Jackson's Secretary of War, John Eaton, was cognizant of the Five Tribes' desires to maintain their highly-developed systems of government,[4] Letter from John Eaton to the Cherokee Delegation (April 18, 1829), *in* DOCUMENTS OF UNITED STATES INDIAN POLICY 44, 45-46 (Francis P. Prucha ed., 2d ed. 1990), and in mid-1829 rejected such claims only where those tribes then resided,[5] *see id.* at 46. In December 1829, in his first annual message to Congress, President Jackson reconfirmed that policy:

> As the white man advanced . . . the Choctaws would surely be weakened, and eventually, would meet the fate of the Mohegan and the Narragansett Indians, who long ago lost their tribal lands and identity. The only way to prevent such a tragedy was for the United States to set aside an ample district west of the Mississippi River, to be guaranteed . . . as long as they occupied the land. There they could be *free of white men* except for a few soldiers who would be stationed in the area to preserve peace on the frontier. . . . [R]emoval to such a Utopia would be

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[4] *See generally, e.g.*, DUANE K. HALE & ARRELL M. GIBSON, THE CHICKASAW 44 (1991) (describing construction and operation of schools by Chickasaw Nation – with *tribal* funds – in mid-1820s); Dennis W. Arrow, *Oklahoma's Tribal Courts: A Prologue, the First Fifteen Years of the Modern Era, and a Glimpse at the Road Ahead*, 19 OKLA. CITY U. L. REV. 5, 8-9 (1994) (discussing published Cherokee code of laws and legal developments in the Choctaw Nation).

[5] Later in 1829, Eaton also recognized that the blanket extension of state laws to include all Indians "would have disastrous results on tribal culture." Letter from John Eaton to Chief Folsom (July 30, 1829), *in* DEROSIER, *supra*, at 102.

> voluntary, but *if* the Indians remained east of the Mississippi River, they would be subjected to the laws of the several states.

DEROSIER, *supra*, at 104 (emphasis added). Three months later, through official and unofficial channels, negotiations between the United States and the Choctaw Nation began, *id.* at 113, and after both extensive negotiation and substantial coercion, *id.* at 117-24, those negotiations, with Secretary Eaton representing the United States, *id.* at 119, produced the text of the Treaty of Dancing Rabbit Creek, Treaty of Sept. 27, 1830, 7 Stat. 333. But in that treaty, which effectively extinguished Choctaw land rights in Mississippi, *id.* art. III, and reduced the quantity of Choctaw lands in Oklahoma, *id.* art. II, the Choctaws were provided with self-government guarantees broader by far than any before offered to any other tribe, *see* 7 Stat. 13-332 (providing text of all treaties entered into between the United States and Indian tribes prior to Treaty of Dancing Rabbit Creek); *cf. infra* at 44 n.40 (limited number of similarly expansive guarantees *thereafter* granted to any other tribe). As drafted, the preamble to that treaty provided for the Choctaws to live "*under their own laws* in peace,"[6] Treaty of Sept. 27, 1830, 7 Stat. 333 (emphasis added), with its text further providing:

> The Government and people of the United States are hereby obliged to secure to the said Choctaw Nation of Red People the jurisdiction of *government* of all the persons and property that may be within their limits west, *so that no Territory or State shall ever have a right to pass laws for the government of the Choctaw Nation of Red People and their descendants*; and that no part of the land granted them shall ever be embraced in any Territory or

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[6] The preamble was not ratified by the Senate, 7 Stat. 333, with the sole expressed objection to the preamble, 7 CONG. DEB. 346-47 (1831), focusing on its forthright acknowledgement that "the President of the United States has said that he cannot protect the Choctaw people from the operation of . . . [Mississippi] laws. . . ."

> State; *but the U.S. shall forever secure said Choctaw Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States*; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs. But the Choctaws, should this Treaty be ratified, express a wish that Congress may grant to the Choctaws the right of punishing by their own laws, any white man who shall come into their nation, and infringe any of their national regulations.

Id. art. IV, 7 Stat. 333-34 (emphasis added).

The Chickasaw Nation negotiated a series of removal treaties with the United States in the early 1830s, HALE & GIBSON, *supra*, at 48-55, although the situs of its final destination was not determined until 1837.[7] Treaty of Jan. 17, 1837, 11 Stat. 573. That treaty provided that the Chickasaws would acquire the western portion of the Choctaws' Oklahoma lands, "to be held on the same terms as the Choctaws now hold it. . . . " *Id.* art. I, 11 Stat. 573. The United States reaffirmed the 1837 treaty in the Treaty of Apr. 28, 1866, art. X, 14 Stat. 769, 774, and again by statute in 1871, Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified at 25 U.S.C. § 71 (1988)).

2. Petitioner Tax Commission is a statutorily-created body, OKLA. STAT. tit. 68, § 102 (1991), broadly authorized to enforce the provisions of the state's taxation code, *id.* § 202. That code includes a lengthy motor fuel tax scheme, which,

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[7] The first of those treaties, by which the Chickasaw lands east of the Mississippi River were ceded, Treaty of Oct. 20, 1832, art. I, 7 Stat. 381, 382, began, as did the Treaty of Dancing Rabbit Creek, with the observation that "[t]he Chickasaw Nation find themselves oppressed . . . by being made subject to the laws of the States in which they reside," and continued with an expression of the tribal desire for self-government. *Id.*, pmbl.

excluding its "importer" and "special fuel" provisions, *id.* §§ 601-723 (1991 & Supp. 1994), consumes twenty-two pages of double-column print in the unannotated official version of *Oklahoma Statutes*, *id.* §§ 501-531 (1991 & Supp. 1994).

3. The Chickasaw Nation has established a number of businesses on its Indian-country lands. Among those businesses are two convenience stores which sell, among other things, motor fuels at retail to both members and nonmembers of the Tribe. Pet. App. 2a.

With respect to matters now before this Court, prior to the commencement of this litigation, Oklahoma had imposed its motor fuel excise taxes on sales by the Tribe within its Indian country, and had required the Tribe to collect and remit state income taxes on Indian-country income earned by employees of the tribal government (whether or not such employees were tribal members, and whether or not member employees lived within Indian country). R. 8; R. 21. This litigation, in which the Chickasaw Nation sought declaratory and injunctive relief before the United States District Court for the Eastern District of Oklahoma, ensued.[8]

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[8] Initially, the action encompassed six areas in which the Tribe challenged attempted exercises of jurisdiction by the Tax Commission. Specifically challenged were: (1) the validity of a tax warrant issued personally against the Governor of the Chickasaw Nation for taxes allegedly owed by the Tribe; (2) the validity of state motor vehicle excise taxes as applied to tribally-owned vehicles; (3) the validity of retail sales taxes as applied to various purchases by the Tribe for its own use, with the Tax Commission determining for itself whether such sales were for "governmental" or "proprietary" purposes, and exempting only the former from sales taxation; (4) the validity of state taxes imposed on the sale of "weak" (3.2%) beer at tribal retail outlets; (5) the validity of the motor fuel taxes as applied to sales by the Tribe; and (6) the validity of state income taxes as applied to the income of individuals employed directly by the Tribe in Indian country. R. 8. During the pendency of the litigation in the district court, the Tax Commission essentially confessed error regarding the items numbered (1) and (2) above. *See* R. 21 at 2, 4. During the pendency of the litigation in the court of appeals, it essentially did the same with respect to

4. The court of appeals held in favor of the Tribe on the fuel tax issue, and in its favor as well on the income tax question, although in the latter case, limited to the income of tribal members.[9] With respect to the motor fuel taxes, it determined that the legal incidence of such taxes falls upon the retailer of the fuel, and that in this case the retailer is a federally-recognized Tribe doing business in Indian country. Consequently, it concluded, that tax is not opposable to the Tribe. Pet. App. 2a, 12a-16a. And with respect to state taxation of the income of tribal members directly employed by the government of the Chickasaw Nation who perform their functions in Indian country, the court of appeals concluded that such taxation is preempted by treaty guarantees still in force as the supreme law of the land. Pet. App. 19a-30a.

Immediately following the issuance of the court of appeals' judgment in this case, the Chickasaw Nation, which has its own Tax Commission and taxation code, amended that code to impose motor fuel taxes equivalent to those formerly imposed by the state with respect to all fuel sales in Chickasaw Indian country. Resp. to Applic. for Stay App. A (No. A-227).

5. This Court granted the Writ of Certiorari herein on January 6, 1995. Subsequent to that date, legislation was introduced before the Oklahoma legislature which, if enacted, would materially alter the legal relationships of the parties to this litigation, and affect the posture of the issues before this Court. The pending legislation, which was adopted by the Oklahoma House of Representatives on March 9, 1995 and is

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the sales tax question, numbered (3) above. *See* Pet. App. 17a-19a. Thus, those three issues were removed from this litigation. The beer tax issue, numbered (4) above, was resolved adversely to the Chickasaw Nation by the court of appeals, Pet. App. 4a-12a, and the Tribe has not sought certiorari on that issue.

[9] The court of appeals rejected the Chickasaw Nation's contention that treaty rights also shielded the income of nonresident *nonmember* employees from the state's income tax, Pet. App. 21a-23a, and the Tribe has not sought certiorari on that issue.

now before the Oklahoma Senate, is reproduced in an Appendix to this brief. *Infra* at 1a-23a.

SUMMARY OF ARGUMENT

1. Two of the three issues now properly before this Court[10] address the validity of Oklahoma's motor fuel excise tax as applied to Indian-country retail fuel sales by the Chickasaw Nation. As to those issues, the Chickasaw Nation will defend three straightforward propositions.

First, this Court has long adhered to a *per se* rule forbidding state taxation whose legal incidence is on Indian tribes regarding tribal activities in Indian country absent congressional consent. The Tax Commission struggles mightily to establish that "*per se* rule" means "balancing test," see *infra* at 33-36, 39, and that the *legal* incidence question is secondary to the alleged locus of the "economic burden," see Pet. Br. 12, of the tax. But this Court has expressly rejected the former proposition, inter alia, in *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 267 (1992), and expressly rejected the latter, inter alia, in *Gurley v. Rhoden*, 421 U.S. 200, 204 (1975).

Second, the *per se* rule, which establishes a zone of predictability in an area of law with a greater need for certainty than most, should not now be abandoned by this Court. In that conclusion, it is pleased to be supported by the eleven large Indian-country states which have appeared as amici in this case. Brief of States of South Dakota [*et al.*] in Support of Petitioner at 1-2 [hereinafter "States' Br."]; *cf.*

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[10] The Chickasaw Nation will establish herein that the Tax Commission's eleventh-hour, three-paragraph contention concerning the Hayden-Cartwright Act, 4 U.S.C. § 104, see Pet. Br. 23-24, which was neither argued by either party below nor even *alluded* to in the Petition or its Questions Presented, is not properly before this Court, *infra* at 15-18, and that the only justification proffered by the Tax Commission for consideration of that issue by this Court is incredible, *infra* at 16-18.

County of Yakima, 502 U.S. at 268 ("For reasons of practicality, as well as text, we adhere to our per se approach.").

Third, this Court has long given great deference to courts of appeals' interpretations of state law. The Chickasaw Nation will establish, through both textual and structural analysis, that the Tenth Circuit's conclusion that the legal incidence of Oklahoma's fuel tax is on retailers (in this case, the Chickasaw Nation, thereby triggering the *per se* rule) was a reasonable one. Moreover, it will demonstrate that taken as a whole, the Tax Commission's proffered construction of the state's fuel-tax scheme (whichever way the Tax Commission argues it, *see generally infra* at 13-14 & n.14 (describing earlier reversals of position)), may establish an absurd structure pursuant to which no one *really* has to pay the tax, *e.g.*, *infra* at 26 n.22.

2. In 1830, the Choctaw Nation was provided with treaty guarantees more comprehensive than any before provided in the history of the United States; Respondent Chickasaw Nation became a beneficiary to those guarantees in 1837. The Tax Commission would have this Court construe them as dead letter, but the Chickasaw Nation will establish the limited proposition that such guarantees shield the *income* of tribal *members*, employed by the *government* of the Chickasaw Nation *within its Indian country*, from state taxation (wherever such members may reside). It will do so by textual and structural analysis, and by legislative history cognizable pursuant to applicable canons of construction.

ARGUMENT

I. IN LIGHT OF LEGISLATION NOW PENDING BEFORE THE OKLAHOMA SENATE, THIS COURT MAY WISH TO CONSIDER DISMISSING THE WRIT AS IMPROVIDENTLY GRANTED.

1. In its Petition, the Tax Commission asserted that "[i]t is indisputable" that the state could impose its motor fuel tax on sales by the Chickasaw Nation "by declaring the tax to fall on the consumer. . . . " Pet. 17; *see also* Pet. Br. 13-14. While

maintaining that pursuant to *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), and *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976),[11] inter alia, the state may not impose its motor fuel tax on Indian-country sales by the Tribe to tribal *members*, *infra* at 40-41, the Chickasaw Nation does not otherwise take issue with the Tax Commission's assertion.

2. In legislation which was approved by the Oklahoma House of Representatives on March 9, 1995 (and which is now pending before the Oklahoma Senate), OKLA. STAT. tit. 68, §§ 502, 502.2, 502.4, 502.6, 516, and 522 (1991 & Supp. 1994), are amended to include, inter alia, the following language in each:

> It is the purpose and intent of this section that the tax levied on gasoline pursuant to the provisions of this article shall be a levy and assessment on the consumer, and the levy and assessment on other persons as specified in this article shall be as agents of this state for the collection of the tax.

Infra at 3a, 5a, 8a, 10a, 17a, 19a-20a. That legislation also amends the state's diesel fuel statutes, OKLA. STAT. tit. 68, §§ 502.1, 502.3, 502.5, 502.7, and 522.1 (1991), to include identical language modified only by the substitution of "diesel fuel" for "gasoline," *infra* at 4a, 6a, 9a, 12a, 21a, and contains conforming amendments to OKLA. STAT. tit. 68, §§ 505(C) and 520 (1991 & Supp. 1994), *infra* at 15a-16a, 19a. The Chickasaw Nation does not dispute that such statutory modifications would, if enacted, be sufficient to move the incidence of the state's motor fuel taxes from retailers to ultimate consumers.

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[11] In those cases, this Court, having already determined that the legal incidence of the state cigarette taxes there in issue *was* on ultimate consumers, *Colville*, 447 U.S. at 142 & n.9; *Moe*, 425 U.S. at 481-82, nevertheless held that such state taxes were valid only as applied to tribal nonmembers. *Colville*, 447 U.S. at 158; *Moe*, 425 U.S. at 480.

3. The Chickasaw Nation maintains that the fuel tax is non-opposable to it (with respect to sales to nonmembers) *solely* because its legal incidence falls on the Tribe, and the activity taxed is conducted in Indian country. Br. in Opp. 12-25; *infra* at 19-39. But should the pending legislation be enacted, that issue will be rendered moot.[12]

4. In addition to the "incidence of the fuel tax" consequences of the pending legislation discussed above, that legislation would add the following paragraph to OKLA. STAT. tit. 68, § 527 (Supp. 1994):

> C. Sales of motor fuel and diesel fuel to federally recognized tribes for use in tribally owned vehicles *used exclusively for governmental purposes* shall be exempt from the taxes levied by this Article. Federally recognized Indian tribes shall be issued a tax exemption certificate from the Oklahoma Tax Commission *for that portion authorized by this section to be tax exempt.*

Infra at ~~22~~a (emphasis added).

Prior to this litigation reaching the court of appeals, the Tax Commission sought to impose a "governmental/proprietary" distinction (and to reserve to itself the power to apply that distinction) in the context of applying its *sales* tax to purchases made by the Tribe for its own use. *Supra* at 7-8 n.8. It withdrew that jurisdictional assertion before the court of appeals, with that court reproducing the Tax Commission's letter which effectuated that result in the text of its opinion. Pet. App. 17a-18a. In consequence, the court of appeals did not rule on the Chickasaw Nation's objections to the Tax Commission's earlier assertions of such jurisdiction. *Id.* at 19a & n.5. But as is apparent from the proposed language

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[12] While it is true that the portion of the first Question Presented which relates to Indian-country fuel purchases by *members* from the Tribe would not be mooted, that issue is a small component of this case, *see* Pet. Br. 12-13 (emphasis in original) ("The [fuel] purchasers . . . are, in substantial part, *non-Indians* or *non-members* of the Tribe."), and presents no novel issue to this Court, *infra* at 40-41.

quoted above, adoption of the pending legislation would re-create the issue formerly withdrawn from submission to the court of appeals, albeit in a fuel tax rather than the earlier sales-tax context. No such issue is now before this Court.

II. PURSUING A "MOVING TARGET" APPROACH, THE TAX COMMISSION'S PETITION REVERSED ITS FORMER "INCIDENCE OF THE FUEL TAX" THEORY OF THE CASE, AND ITS BRIEF-IN-CHIEF NOW SEEKS TO ADD AN ADDITIONAL THEORY NEVER BEFORE ARGUED, AND NOT PRESENTED BY ITS PETITION FOR CERTIORARI.

A. The Tax Commission's New Theory that the Legal Incidence of the Fuel Tax Is on the Ultimate Consumer Is the Opposite of What It Argued to the Court of Appeals and District Court Below.

At every stage of the instant litigation below, the Tax Commission vigorously maintained that the legal incidence of Oklahoma's motor fuel tax was on the *wholesale distributor*. Br. in Opp. 16 (quoting Tax Commission's briefs before court of appeals and district court). Yet astoundingly, in its Petition, the Tax Commission did a 180-degree pirouette, abandoned the central premise of its former fuel-tax argument (which it had pursued through three years of litigation below), and urged to this Court – with equal conviction – that the legal incidence of the motor fuel tax is *really* on the *ultimate consumer*. Pet. 20-23. In such a context, at the very least, the Tax Commission's representation to this Court that *"the State consistently has understood the incidence of the tax to fall on the consumer,"* Pet. 17 (emphasis added),[13] lacks credibility of the most fundamental kind.[14]

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[13] Incomprehensibly, the Tax Commission actually *reiterates* that patently false representation to this Court in its Brief-in-Chief, Pet. Br. 30, *even after the Chickasaw Nation called this Court's attention*, Br. in Opp.

Nevertheless, this Court granted the Writ herein on the Questions Presented *by the Tax Commission*, and the Chickasaw Nation acknowledges that the legal incidence of the fuel tax – whichever way the Tax Commission wishes to argue it – is "fairly included" in the Tax Commission's second Question Presented. The Chickasaw Nation will therefore respond on the merits of *that* new Tax Commission theory in this brief. See *infra* at 22-32.

But the Chickasaw Nation respectfully submits that the above-described facts provide meaningful context to a far more egregious attempt by the Tax Commission to smuggle an entirely new issue into this case, never before argued, neither cited nor briefed to this Court in the Petition, not "fairly included" in any Question Presented, and raised for the first time in the lengthy history of this litigation in the Tax Commission's Brief-in-Chief on the merits to this Court. In the immediately-following subproposition, the Chickasaw Nation will strongly urge this Court to decline to reward appeal by ambush, and to refrain from exercising its acknowledged *power* to consider or resolve that issue.

16, *to its earlier directly contradictory position concerning the legal incidence of the tax.*

[14] Worse yet, having utterly abandoned its "incidence is on the distributor" argument in its Petition, and perhaps troubled by the fact that the Chickasaw Nation called the attention of this Court to that fact, *see* Br. in Opp. 16-17, the Tax Commission now attempts to move the target yet again by attempting to have it *both* ways in its Brief-in-Chief, *see* Pet. Br. 39. Respondent can only imagine how the Tax Commission will argue the "legal incidence" question in its Reply, but believes that in arguing that the legal incidence is on wholesalers, consumers, or either, it has now exhausted the universe of possibilities potentially availing to it. In any event, the Chickasaw Nation will establish to this Court that the legal incidence of the state's fuel tax is on retailers – exactly where the court of appeals concluded (and where the Tribe has always contended) that it was. *Infra* at 22-32.

B. The Tax Commission's New Theory Based on the Hayden-Cartwright Act, 4 U.S.C. § 104, Should Neither be Considered Nor Resolved by this Court.

1. The Hayden-Cartwright Act was neither raised in the Tax Commission's answer, R. 21, nor invoked by the Tax Commission at any stage below, *e.g.*, R. 25, R. 31. In a footnote, *sua sponte*, the court of appeals expressly noted:

> In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 n. 16 (1980), the Supreme Court declined to reach the question whether Indian reservations might be encompassed by the Hayden-Cartwright Act, 4 U.S.C. § 104, which provides for the imposition of state fuel taxes "on United States military or other reservations." *This issue was not raised before this court, and we express no opinion on it.*

Pet. App. 14a n.4 (emphasis added).

2. In September 1994, the Tax Commission petitioned Justice Ginsburg to stay the court of appeals' judgment. (The stay was denied by Justice Breyer, as new Circuit Justice, on October 11.) Nowhere in its application did the Tax Commission cite or mention the Hayden-Cartwright Act. Later in October 1994, the Tax Commission filed its Petition. Nowhere in that Petition is the Hayden-Cartwright Act cited or mentioned.

The Tax Commission's first Question Presented inquires "[w]hether *principles of federal pre-emption or Indian sovereignty preclude* a state" from imposing its motor fuel tax under certain circumstances. Pet. i (emphasis added). But it is clear that the Tax Commission's new Hayden-Cartwright theory maintains that the Act "*expressly authorizes*," Pet. Br. 24 (emphasis added), a tax *otherwise forbidden* by federal law. Such a contention is neither a "principles of Indian sovereignty" nor a "federal *pre-emption*" argument in any form known to Respondent. And since neither the Tax Commission's second (incidence of the fuel tax) nor third (income

tax) Questions Presented encompass the Hayden-Cartwright question either, that issue is not "fairly presented" by the Petition. *See* SUP. CT. R. 14.1(a).

3. Although there is no statutory requirement that an issue be raised in the court of appeals in order for this Court to enjoy the power to decide it, this Court, as a prudential matter, has generally imposed such a requirement. *E.g.*, *EEOC v. FLRA*, 476 U.S. 19, 24 (1986) (per curiam). Absent exceptional circumstances, its reluctance to pass on such issues has been still further increased where the issue was not raised in the Petition. *E.g.*, *Berkemer v. McCarty*, 468 U.S. 420, 443 & n.38 (1984). Among the most frequently-articulated policy considerations supporting that approach are: (1) providing an enhanced opportunity for this Court to avail itself of prior deliberation of the issue; (2) encouraging petitioners to candidly inform this Court as to the issues to be presented, so as to fully inform its judgment on the decision whether to grant the Writ (and if so, on what issues); (3) respect for state supreme courts and federal courts of appeals; (4) fairness to the opposing party; and (5) the efficient administration of an integrated system of trial and appellate courts.

4. The Tax Commission has pointed to no exceptional circumstances warranting deviation from this Court's normal practice herein. In fact, the only justification it presents for not having raised the issue below is fatuous. That justification, *verbatim*, is as follows:

> *Oklahoma did not assert the Act in defense of its tax in the lower courts because it was of the view that "the relevant boundary for taxing jurisdiction is the perimeter of a formal reservation*, not merely land set aside for a tribe or its members." *Sac and Fox*, 113 S. Ct. at 1991. The State therefore viewed Chickasaw lands as indistinguishable for fuel tax purposes from other lands; because Chickasaw lands were seen as within the State's taxing jurisdiction, they were seen as outside the scope of the Hayden-Cartwright Act. *But the Court's decision in* Sac and Fox, *issued after the state filed its brief in*

> *the court of appeals, rejected the State's position* – and therefore implicitly made clear that the Act applies to Indian country.

Pet. Br. 24 n.11 (emphasis added).

In other words, having not read (or not believed) this Court's pronouncements on the "Indian country" issue in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 n.5 (1987) (emphasis added) (definition of "Indian country" contained in 18 U.S.C. § 1151 "applies to questions of both criminal and civil jurisdiction"), or *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1975) (same), or *United States v. John*, 437 U.S. 634, 648-49 (1978) (cognizability of trust lands as Indian country under test established by *United States v. Pelican*, 232 U.S. 442, 449 (1914)), or numerous like cases decided by this Court *prior to* the filing of the original complaint in this case on May 29, 1991 (perhaps because the Tax Commission was not a party to those cases), it did not know what the law was, and consequently relied on its own ignorance in waiving an alternative potential defense it now wishes to litigate. That, in itself, is bad enough. Worse is the fact that this Court *had* informed the Tax Commission – *directly*, in a case to which it *was a party* – of the state of the law *three months prior to the filing of the Chickasaw Nation's complaint*.

In the Tax Commission's proffered justification for not earlier raising the Hayden-Cartwright issue, this Court will discover a citation to "*Sac and Fox*, 113 S. Ct. at 1991." *Supra* at 16 (quoting Pet. Br.). This Court *already knows* that the first sentence of the immediately-following paragraph in *Oklahoma Tax Commission v. Sac & Fox Nation*, 113 S.Ct. 1985 (1993) reads: "Nonetheless, in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.* [498 U.S. 505 (1991)], *we rejected precisely the same argument – and from precisely the same litigant*." 113 S.Ct. at 1991 (emphasis added). *Citizen Band Potawatomi* was handed down on

February 26, 1991, three months *prior* to the filing of the Chickasaw Nation's complaint in this case.[15]

In short, the Tax Commission's proffered justification for not raising the issue earlier[16] is literally incredible, and presents no "exceptional circumstances" which should cause this Court to consider its eleventh-hour Hayden-Cartwright contention.

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[15] Thus, the Tax Commission would apparently have this Court believe: (1) that it did not *read* this Court's decision in *Citizen Band Potawatomi*, although it was a party to that case; or (2) that it did not *understand* that decision (which may be true in light of its subsequent argumentation in *Sac & Fox*, but does not constitute the *type* of "exceptional circumstances" which should warrant consideration of its new Hayden-Cartwright issue by this Court); or (3) that it had *forgotten* this Court's direct explanation of the "Indian country" principle to it in *Citizen Band Potawatomi* by the time it filed its answer in this case six months later. The only other alternative explanation which the Chickasaw Nation can imagine is that for the *second* time before this Court, see *supra* at 13 & n.13 (discussing the Tax Commission's representation that it "consistently has understood the incidence of the [fuel] tax to fall on the consumer"), the Tax Commission has engaged in a material factual misrepresentation, *see generally* R. 25 at 8 (citation of *Citizen Band Potawatomi*, and treatment of trust lands as the equivalent of formal reservations, in Tax Commission's *February 1992* Brief in Support of Motion for Summary Judgment).

[16] Even taken at face value (though that is virtually impossible to do), this Court's *second* direct explanation of "Indian country" consequences to the Tax Commission (in *Sac & Fox*) was handed down on May 15, 1993, fourteen months *before* the court of appeals rendered its judgment in this case. The Tax Commission's own explanation therefore fails to explain why it failed to raise the Hayden-Cartwright issue in the court of appeals after that date, or why it failed to raise the issue in a petition for rehearing therein, or why it failed to present the issue when it petitioned the court of appeals for a stay, or why it failed to bring the issue to Justice Breyer's attention in its Application for Stay to this Court, or why it failed to raise the issue in its Petition. *See generally, e.g., EEOC v. FLRA*, 476 U.S. 19, 24 (1986) (per curiam) ("[A]t most that might excuse the EEOC's failure to press the claim before the FLRA; it does not excuse the EEOC's failure to raise it at any point in the Court of Appeals.").

III. ABSENT ENACTMENT OF THE PENDING LEGISLATION DISCUSSED IN PROPOSITION I, OKLAHOMA MAY NOT IMPOSE ITS MOTOR FUEL TAX ON ANY FUEL SALES BY THE CHICKASAW NATION WITHIN ITS INDIAN COUNTRY.

A. This Court Has Historically and Consistently Given Great Deference to Courts of Appeals' Interpretations of State Law.

It is this Court's "practice to accept a reasonable construction of state law by the Court of Appeals 'even if an examination of the state-law issue without such guidance might have justified a different conclusion.' " *Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983). The Tax Commission recognizes as much. *See* Pet. 22-23; Pet. Br. 35 n.18.[17]

B. Powerful Policy Considerations Support Adherence by this Court to its Long-Standing Principle that the Legal Incidence of a State Tax Is Dispositive Where Taxation of an Indian Tribe Regarding Its Indian-Country Activities Is Concerned.

In *California Board of Equalization v. Chemehuevi Indian Tribe*, 474 U.S. 9 (1985), this Court held foursquare that while the legal incidence of a state tax may fall on

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[17] The only attempt the Tax Commission makes to qualify the *applicability* of that principle herein is bizarre. Having strenuously argued that the "federal instrumentality" doctrine is no longer applicable to Indian tribes, Pet. Br. 20-21 (a proposition with which the Chickasaw Nation had already agreed, Br. in Opp. 24), the Tax Commission argues further that "when the determination of a tax's legal incidence affects a *federal* right to tax immunity, 'the duty rests on this Court to decide [such issues] for itself,' " Pet. Br. 35 n.18 (emphasis added). As authority for that manifestly irrelevant proposition, it offers a case involving an attempted state tax *on the federal government*, *United States v. Tax Comm'n of Mississippi*, 421 U.S. 599 (1975), and two *federal instrumentality* cases. See Pet. Br. 35 n.18.

consumers despite the absence of any statutory provision so stating, and despite the absence of any "pass on and collect" provision, the test "is nothing more than a fair interpretation of the statute as written and applied. . . . " *Id.* at 11. The Tenth Circuit has long demonstrated its mastery of the *Chemehuevi* principle. *E.g.*, *Indian Country, U.S.A. v. Oklahoma Tax Commission*, 829 F.2d 967, 984 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988) (holding that legal incidence of Oklahoma's *sales* tax falls "downstream" of retailers, on ultimate consumers, despite absence of any express statutory language so providing).

But *Chemehuevi* does *not* hold that any state tax involving a retailing Indian tribe is conclusively presumed to be a consumer tax, or that such a tax must be so construed where any ambiguity exists in a complex and lengthy state taxation scheme. Such an interpretation is foreclosed, inter alia, by the "fair interpretation" language of *Chemehuevi* itself.

Moreover, neither *Chemehuevi* nor any other decision of this Court supports the Tax Commission's attempt, *where the issue in question concerns an attempt by a state to tax an Indian tribe regarding its Indian-country activities*, to render the legal incidence of a tax irrelevant (or to marginalize the legal incidence question) based on economic assumptions about whether consumers will "really" bear the "economic burden" of the tax. See Pet. Br. 12-14, 22, 25, 29-31 (so arguing). To be sure, the Chickasaw Nation is well aware of cases such as *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), frequently invoked by the Tax Commission, Pet. Br. 10, 30, 31, in which this Court – in the non-Indian context – has occasionally disregarded the formal nomenclature which a state has applied to a tax. But it has never disregarded the legal incidence of a tax in a case involving the attempted state taxation of an Indian tribe regarding its Indian-country activities.

The Tax Commission's invocation of *Department of Taxation & Finance v. Milhelm Attea & Bros., Inc.*, 114 S. Ct. 2028 (1994), Pet. Br. 15, 17, 19, 25, 27, 29, does nothing to

undermine that conclusion. The Tax Commission, for example, at one point quotes *Milhelm Attea* for the proposition that "sales to persons other than reservation Indians . . . are legitimately *subject to* state taxation." Pet. Br. 17 (emphasis added). But this Court cited *Colville* for that proposition in *Milhelm Attea*, 114 S. Ct. at 2031, and in *Colville* this Court had determined that the *legal* incidence of the tax in issue was on *consumers*, 447 U.S. at 481-82. Thus, it becomes clear that the real meaning of the passage invoked by the Tax Commission from *Milhelm Attea* is that nonmembers are "subject to" state taxation *when the legal incidence of such taxation is on them*. Extrinsic passages from *Milhelm Attea* reconfirm that conclusion.[18] The *legal* incidence of a tax, in short, is dispositive where state attempts to tax Indian tribes regarding their Indian-country activities are concerned.

That result, the Chickasaw Nation notes, may operate to the benefit of a state as easily as a tribe. In *Moe*, for example, this Court rejected a *tribal* contention that the legal incidence of a state tax was irrelevant since the economic burden of that tax would fall upon the tribe. 425 U.S. at 481-82. Nevertheless, as will be developed further in Proposition III-D, *infra* at 32-38, the fact that the legal incidence of state taxes has been held by this Court to be dispositive works hand-in-glove with the *per se* rule, and is essential to the coherent and predictable operation of that rule.

The Chickasaw Nation has already argued to this Court that the *per se* rule "has been consistently followed, and establishes a bright-line rule which has proved workable in practice," Br. in Opp. 7-8, and is gratified that in that conclusion it is now supported by eleven of the largest Indian-

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[18] *E.g.*, 114 S. Ct. at 2034 ("[T]he cigarette tax in *Moe* fell upon a class – non-Indians – whom the State had power to tax."); *id.* at 2035 ("New York's regulations . . . stand[ ] on a markedly different footing from a tax imposed directly on . . . tribal organizations. . . . "); *id.* at 2037 (emphasis and bracketed material in original) (finding that state had not "impose[d] a . . . tax *on Indian retailers*").

country states, States' Br. 2 (describing *per se* rule as a "bedrock" principle of Indian law, providing a "reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority"). Abandonment by this Court of the *legal* incidence precondition to invocation of the *per se* rule would decimate the bright-line nature of that rule.[19]

C. "Fairly Interpreted," the Legal Incidence of Oklahoma's Motor Fuel Tax Falls Upon the Retailer of the Fuel – in this Case, the Chickasaw Nation.

1. Oklahoma's motor fuel tax scheme, which places the incidence of the tax on the *retailer* (in this case, the Chickasaw Nation), differs materially from both the fuel tax schemes of other states, see Br. in Opp. 5-6 & n.5, and the cigarette-tax scheme at issue in *Chemehuevi*. Unlike the tax at issue in *Chemehuevi*, *see* 474 U.S. at 11, Oklahoma's scheme contains no provision making consumers as consumers

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[19] Apart from that, abandonment of this Court's approach finding the *legal* incidence of a state tax to be controlling might well cause this Court to reconsider its cigarette-tax holdings in *Moe* and *Colville*, since the tribal parties in those cases argued that though the legal incidence of state taxes there in issue might be elsewhere, the "economic burden" of those taxes would really fall on them. *See Colville*, 447 U.S. at 157-58; *supra* at 21 (discussing *Moe*). While the Chickasaw Nation might economically benefit from such a result (it, too, operates smokeshops), it cannot represent to this Court that such a result would contribute to stability and predictability in the law.

Moreover, abandonment of this Court's legal incidence approach would require the reversal of *Chemehuevi* (and possibly other cases *see, e.g., infra* at 34 (discussing *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989)); *cf. infra* at 25 n.21 (discussing *Gurley v. Rhoden*, 421 U.S. 200 (1975))), or the recognition by this Court that its meticulous legal-incidence reasoning in *Chemehuevi* was an exercise in now-irrelevant futility.

responsible for payment of the tax. To the contrary, Oklahoma law specifically provides that motor fuel taxes are "remitted by a distributor *on behalf of*" retailers, *see* OKLA. STAT. tit. 68, § 505(C) (Supp. 1994) (emphasis added), and establishes a collection method in which the distributor is "made an *agent of the state*" for the collection of that tax, *id.* § 506(a) (1991). And the "collection" is from *retailers*. *Infra* at 23-24 n.20, 26 n.22 (discussing § 505(C), and structural implications of the Tax Commission's interpretation of that provision); OKLA. STAT. tit. 68, § 505(E) (Supp. 1994) (emphasis added) (Any *retailer or dealer . . . shall . . . pay to the distributor, for the benefit of the state*, all taxes due on diesel fuel . . . or may procure a distributor's license. . . . ");[20] *id.* § 507 (providing

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[20] The Tax Commission's attempt to limit the implications of OKLA. STAT. tit. 68, §§ 505(C), 505(E) (Supp. 1994), see Pet. Br. 38, is unavailing. This Court will discover that the Tax Commission has not *quite* presented an "unabridged version," Pet. Br. 38, of the "relevant portion," *id.*, of that provision. Rather, the Tax Commission, omitting reference to the second paragraph of § 505(C), begins its quotation with the sentence which follows, substituting "[for]" for "of" in that sentence.

More fundamentally, apparently concluding that the paragraph immediately preceding the sentence which it quotes does not constitute a "relevant portion of Section 505C," see Pet. Br. 38, the Tax Commission fails to note that that paragraph, unabridged, provides:

> It shall be unlawful for any distributor, *retailer or dealer* to sell or offer for sale in this state, motor fuel or diesel fuel while delinquent in the payment of any excise tax due the state.

OKLA. STAT. tit. 68, § 505(C) (Supp. 1994) (emphasis added). Nowhere in the elaborate statutory scheme is any provision precluding the use of untaxed gasoline by consumers, or imposing tax-payment obligations on them, to be found. *Cf. infra* at 27 (describing such provisions in Oklahoma's *cigarette*-tax scheme). In light of the second paragraph of § 505(C), which provides the *context* in which the immediately-following sentence (quoted by the Tax Commission) must be read, its argument actually backfires in two ways.

First, while the Tax Commission would have this Court believe that § 505(C) creates a "class of cases in which retailers do not play any role in paying or collecting the tax," Pet. Br. 38, in reality the reverse is true: the second paragraph of § 505(C) makes clear that while *consumers* have no

that purchases from distributors *from other distributors* are not subject to the tax). Distributors are effectively paid a 2½% commission for acting as state agents in the process of collecting the tax. *See, e.g., id.* §§ 502, 502.1, 506(a), 522.1.

Again unlike the cigarette-tax scheme at issue in *Chemehuevi*, the Oklahoma fuel-tax scheme exempts the *distributor* from any obligation to remit to the state fuel taxes that are determined to be "uncollectible *by the distributor*," *id.* § 505(C) (emphasis added). In short, distributors, as agents of the state, *id.* § 506(a), collect fuel taxes from retailers, on whom Oklahoma's statutory scheme imposes a legal obligation to pay, *supra* at 23 & n.20 (citing statutes). Neither consumers nor distributors have any *independent* obligation to pay, evidenced in the former case by the absence of any

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obligation to pay, *retailers (or dealers) do*. As an ancillary matter, that paragraph also reveals as misleading the Tax Commission's observation that § 505(E), which also requires retailers or dealers to "pay" (either to distributors, or to the state directly upon procurement of a distributor's license), "contains no enforcement mechanism," see Pet. Br. 38 n.20. While that statement is literally true, it – along with § 505(C) – establishes a *legal obligation* to pay, and the Tax Commission has methods not contained in § 505(E) for the collection of taxes unlawfully withheld, *see, e.g.*, OKLA. STAT. tit. 68, §§ 103, 105, 202(b), 203, 206, 212, 215, 231, 231.2, 234, 252, 253, 254, 260, 505(F), 514(e) (1991 & Supp. 1994). *See generally infra* at 26 n.22 (describing absurd consequences flowing from Tax Commission's interpretations of §§ 505(C) and 505(E)); *supra* at 23-24 (discussing limited "collection agent" duties of distributors); *infra* at 26 n.23 (same).

Second, if the Tax Commission intends by its italicization of "*collected on behalf of a nonlicensed purchaser*," Pet. Br. 38, to equate "nonlicensed purchasers" with consumers, then even ignoring all prior argumentation in this footnote, by the Tax Commission's own logic, consumers, no less than retailers, must be within the "class" which does "not play any role in paying or collecting the tax," see Pet. Br. 38. That conclusion, in turn, would decimate the Tax Commission's own "incidence is on consumers" argument, which it argued exclusively in the Petition, Pet. at 20-23, and which save for a single paragraph, Pet. Br. 39, it now argues exclusively to this Court, *id.* at 33-38.

provision imposing payment obligations on consumers or forbidding the use of untaxed gasoline, and in the latter one by the acknowledgment that since distributors are only collection agents, they may not be required to pay taxes *they* do not owe (but have been unable to *collect* from retailers), OKLA. STAT. tit. 68, § 505(C) (Supp. 1994). On these facts, *Gurley v. Rhoden*, 421 U.S. 200 (1975), invoked by the Tax Commission, Pet. Br. 39, is indeed relevant to this litigation – but not in the manner it asserts.

In its *Gurley* argument (in which it maintains in the alternative that the legal incidence of Oklahoma's fuel tax is on *wholesale distributors*), Pet. Br. 39, the Tax Commission blithely assumes that "distributors" under Oklahoma's fuel-tax scheme and "producers" under the United States' fuel-tax scheme are similarly situated for purposes of applying *Gurley*'s approach to "uncollectibility" provisions. (That approach, as this Court well knows, found the fact the United States could not collect its fuel tax from a producer's *vendees* in the event of producer nonpayment persuasive in concluding that the legal incidence of the fuel tax was on producers. 421 U.S. at 205-06.)[21] But in the sentence in *Gurley* which immediately precedes the one the Tax Commission quotes, *compare* 421 U.S. at 205 *with* Pet. Br. 39, this Court had found that "the congressional purpose to lay the tax on the 'producer' and *only* upon the 'producer' could not be more plainly revealed." *Gurley*, 421 U.S. at 205 (emphasis added). By contrast, since the Oklahoma statute exempts (and the due process clause of the fourteenth amendment might well forbid) collection of a tax *from* Oklahoma fuel distributors (other than as collection agents) when the legal obligation for that

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[21] The Tax Commission also invokes *Gurley* in support of the proposition that even where the legal incidence lies elsewhere, fuel taxes may ultimately be passed on to the consumer at the pump, Pet. Br. 12, but fails to note that in the two sentences immediately following the sentence which it quotes, *this Court held that fact to be irrelevant to the dispositive legal-incidence question*, 421 U.S. at 204.

tax is imposed on retailers, *supra* at 23-24 & n.20 (citing statutes); *infra* at 26 n.23 (same), Oklahoma distributors are not similarly situated with the "producers" at issue in *Gurley*. Rather, the relevant analogies are between Oklahoma *consumers* and the *vendees* of producers in *Gurley* (since neither has an obligation to pay), and between Oklahoma *retailers* and *producers* in *Gurley* (since both such entities *do*).[22] Thus, the *Gurley* Court's conclusion that the "uncollectibility" consequences inherent in the United States' fuel-tax scheme, *Gurley*, 421 U.S. at 205-06, reinforced its conclusion that the legal incidence of that tax was on producers, *id.* at 205, operates *mutatis mutandis* to reinforce the Chickasaw Nation's (and the court of appeals') conclusion that the legal incidence of Oklahoma's fuel tax is on *retailers*. Rather than providing support to the Tax Commission's "nonpayment" analysis, *Gurley*, properly applied, is devastating to its "incidence of the fuel tax" contention – *whichever* way the Tax Commission argues it.[23]

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[22] Implicit (and perhaps explicit, see Pet. Br. 38 n.20) in the Tax Commission's argument is the absurd proposition that the Oklahoma legislature, having imposed no penalty on consumers' use of untaxed fuel, and having relieved distributors of any obligation to replace any taxes lost to the state due to failure of retailers to pay them, provided the Tax Commission with no mechanism for collecting such taxes from retailers, so that *no one* really has to pay the fuel tax, with life presumably passing merrily on. But the statutory arsenal available to the Tax Commission for nonpayment by *retailers* is extensive, *e.g.*, *supra* at 24 n.20 (citing statutes), but is utterly barren regarding consumers and distributors (except as to taxes paid *to* the latter – presumably voluntarily – by retailers, see OKLA. STAT. tit. 68, § 506(b) (1991)).

[23] Moreover, even apart from structure, *supra* at 26 n.22, other statutory provisions, *supra* at 23-24, and *Gurley*, OKLA. STAT. tit. 68, §§ 506(a), (b) (1991) are independently fatal to the Tax Commission's alternative "incidence is on the wholesaler" contention. Those provisions add further context to *id.* § 505(C)'s distributor-agent characterization, in the former case, both by reiterating and providing a consideration for the distributor's agency duties, *id.* § 506(a), and in the latter one, by making clear that any breach of trust in fulfilling those agency duties subjects the

Demonstrating that the Oklahoma legislature knows how to impose consumer taxes *where it wants to* are the similarity of Oklahoma's cigarette tax to the California cigarette tax at issue in *Chemehuevi* – and the *dissimilarity* of Oklahoma's cigarette and fuel-tax schemes. Oklahoma's cigarette-tax scheme, for example, provides that there is "hereby levied upon the *sale, use, gift, possession, or consumption* of cigarettes within the State of Oklahoma a tax. . . . " OKLA. STAT. tit. 68, § 302 (Supp. 1994) (emphasis added). Its fuel-tax scheme, as noted above, contains no similar language. Rather, Oklahoma law simply taxes the fuel when it is first sold by the distributor to the retail vendor. *E.g.*, *id.* §§ 502, 505(B), 507 (1991 & Supp. 1994). Moreover, Oklahoma's cigarette-tax statutes make it a criminal offense for "*any person* to . . . have in his *possession* . . . cigarettes on which the tax . . . has not been paid." *Id.* § 306 (1991) (emphasis added). But as also noted above, there is no analogous provision in the state's motor fuel tax scheme.

2. Petitioner attempts to avoid the obvious conclusion – that the tax is a retailer tax – by objections essentially of two types.

Petitioner's first category of argumentation is semantic. Tearing two clauses from the twenty-two page legislative scheme, Petitioner notes that OKLA. STAT. tit. 68, § 501(C) (Supp. 1994) states that "nothing . . . shall require a distributor, dealer *or retailer* to *collect*" the tax in certain circumstances, *id.* (emphasis added), Pet. Br. 35,[24] and that *id.*

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distributor to penalties not for tax evasion, but for *embezzlement*, *id.* § 506(b).

[24] In a misleading paragraph immediately following the paragraph in which it quotes § 501(C), and which addresses the same point as its § 501(C) argument, the Tax Commission states that the exemptions established by

> Okla. Stat., Tit 68, §§ 501B, 502.2B, 502.3B, 502.4B, 502.5B, 502.6B, 502.7B, 522(d) . . . relieve the *consumer* of the obligation to pay the tax and are passed *up* the distribution chain to

§ 509(A) (Supp. 1994)[25] exempts farmers from "paying" a portion of the tax, Pet. Br. 36. As to § 501(C), the Chickasaw Nation notes initially that that provision is phrased in the negative, as merely a disclaimer ("[n]othing in this section shall require . . . "), forcing the Tax Commission to rely upon the manifestly incorrect, *supra* at 24-25, 27, *implication* that *elsewhere* in the fuel-tax scheme is to be found a provision

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> the retailer and then to the distributor. Thus, Section 501B (emphasis added) – again, a definitional provision of the statute – provides that "*[p]urchasers* of nontaxable diesel fuel must comply with the provisions of Section 509 [of this title] *in order to avoid the taxes* levied by Sections 502.1 and 522.1 [of this title]."

Pet. Br. 36 (emphasis and bracketed material in original).

The sequence of that paragraph – as well as the Tax Commission's italicization – might lead this Court to initially conclude that *all eight* of the statutory provisions which it invokes contain language similar to the language it quotes from § 501(B). *That is not the case.* OKLA. STAT. tit. 68, § 522(d) (Supp. 1994) merely states that "[t]he only exemptions from the tax hereby levied are as follows . . . ," and *id.* §§ 502.2(B), 502.3(B), 502.4(B), 502.5(B), 502.6(B), and 502.7(B) (Supp. 1994), all provide, in identical language, that certain fuels "shall be exempt from the tax levied pursuant to the provisions of this section." Thus, every one of those provisions is subject to analysis identical to the Chickasaw Nation's analysis of various other "exemptions" within the statutory scheme, see *infra* at 30-31. And while the Tax Commission quotes a *portion* of § 501(B) correctly, it fails to note that the sentence which immediately follows the sentence which it quotes – and which is equally "definitional" – further provides that "[a]ny *distributor* failing to remit all taxes due" shall be subject to various penalties, *id.* (emphasis added). Not only does the distributor "collect" from the retailer, *supra* at 23-24 & n.20, but the juxtaposition of those two sentences in § 501(B) makes that provision subject to analysis identical to that presented by the Chickasaw Nation regarding § 509.2(C), see *infra* at 30 n.27.

[25] Having mis-cited this provision as "§ 509(b)" in its Petition, Pet. 21, the Tax Commission persists in mis-citing it as "Section 509B" in its Brief-in-Chief, Pet. Br. 36, though the Chickasaw Nation noted earlier that former § 509(b) was redesignated § 509(A) when the state's fuel tax statutes were amended in 1993, Br. in Opp. 19 n.11.

requiring "collection" from consumers. Such a provision, however, is nowhere to be found.

To be sure, with respect to both provisions, it would undoubtedly have been more precise from the perspective of the *totality* of the fuel-tax scheme to have made clear, as do, for example, OKLA. STAT. tit. 68, §§ 505(C), 505(E) (Supp. 1994) (and which are phrased *affirmatively*, requiring no implication at all), that the distributor "collects" from the retailer, and that in light of that fact, distributors are exempted from any obligation to collect taxes *from retailers* where the ultimate purchaser is a farmer. Most other states have framed their exemption and/or refund provisions with greater clarity. *See, e.g.*, MONT. CODE ANN. § 15-70-221(1) (1994) (emphasis added) (allowing certain refunds of "amount of tax paid *directly or indirectly* on the gasoline"). But as the Tenth Circuit (which has been interpreting Oklahoma statutes since shortly after statehood) was well aware, colloquialisms[26] such as the above often occur in the state's statutory language, and among the things that *Chemehuevi* does not hold is that courts construing state taxation schemes must construe them as consumer taxes where two clauses in a

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[26] The Chickasaw Nation is well aware of the importance of literal text in such matters before this Court. Nevertheless, aware also that "it requires some ingenuity to create ambiguity," *Rothschild v. United States*, 179 U.S. 463, 465 (1900), the Tribe points out that text cannot be read in isolation from structure, *see generally supra* at 23-24 n.20, 26 n.22 (discussing implications of Tax Commission's interpretations of § 505(C) on structure of fuel-tax scheme as a whole), and that even as a wholly textual matter, the Tax Commission's proffered construction both utterly ignores numerous *other* textual provisions and relies on an incorrect inference from the "disclaimer" language in § 505(C) (while the Chickasaw Nation relies on affirmative textual statements). Even utterly ignoring the structural implications, and assuming arguendo that the language the Tax Commission cites creates de minimis ambiguity at the margins, it certainly does no more than that, consequently failing to establish that the court of appeals' conclusion was unreasonable. *Cf. supra* at 19 (describing this Court's deference to courts of appeals in state-law matters); *Chemehuevi*, 474 U.S. at 13-14 (Stevens, J., dissenting) (same).

twenty-two page statute create any ambiguity whatsoever. Rather, it simply requires courts to engage in "fair interpretation of the taxing statute," *Chemehuevi*, 474 U.S. at 11, and that is precisely what the Tenth Circuit, long familiar with Oklahoma law, did.

The Tax Commission's second category of argumentation focuses on the exemptions and refunds provided for in the Oklahoma fuel tax scheme. Along this line, it invokes OKLA. STAT. tit. 68, §§ 509.2(A), 509.2(C),[27] 509.2(E), 509.2(F), and 527 (Supp. 1994) for the proposition that the "exemptions" established by those provisions demonstrate that the motor fuel tax scheme creates a consumer tax. Pet. Br. 36-37. Three defects are present in that line of argumentation.

First, the argument proves too much. Every fuel-tax scheme researched by the Chickasaw Nation, see Br. in Opp. 5-6 n.5 (discussing schemes of largest Indian-country states), contains exemptions (or provides for refunds) of some type. *E.g.*, ARIZ. REV. STAT. ANN. § 28-1520 (West Supp. 1994); CAL. REV. & TAX. CODE ANN. § 7401 (West Supp. 1994). Most likely, the fuel tax schemes of each of the fifty states so provides. Yet many of those states – as a matter of state law – characterize their own fuel-tax schemes as wholesaler, not consumer taxes. Br. in Opp. 5-6 n.5. Clearly, among the

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[27] Petitioner also more specifically contends that the "fraudulent exemption-permit user" provision of OKLA. STAT. tit. 68, § 509.2(C) (Supp. 1994) renders Oklahoma's tax a consumer tax. Pet. Br. 36. But the paragraph immediately preceding the paragraph Petitioner cites simultaneously provides that *dealers* placing diesel fuel in the tanks of such fraudulent permit users are *themselves* liable for payment of the tax. The second paragraph of § 509.2(C) no more converts the entirety of the fuel tax scheme into a consumer tax than the first paragraph of that provision conclusively establishes that the scheme is ipso facto a *retailer* tax. By Petitioner's reasoning, for example, S.D. CODIFIED LAWS ANN. § 10-47A-23 (1989), which imposes personal liability on the officers of corporations which have failed to pay applicable fuel taxes, would ipso facto convert the South Dakota scheme into a tax whose legal incidence falls on corporate officers.

numerous propositions that *Chemehuevi* does *not* support is that federal law recharacterizes such taxes as consumer taxes irrespective of a state's characterization of its own taxation scheme. *Supra* at 19 n.17.

Second, Respondent notes that OKLA. STAT. tit. 68, §§ 509.2(A), 509.2(C), 509.2(E), 509.2(F), and 527 (Supp. 1994), all but the last of which were first enacted in 1993, do not replicate the colloquial language of *id.* §§ 501(C) and 509(A) discussed above, *see supra* at 27-29.

Third, this Court, in *Gurley*, expressly rejected a contention identical to the Tax Commission's "exemptions" argument. Recognizing that the federal fuel tax scheme exempts farm-use gasoline from its sweep, 26 U.S.C. § 6420(a) (1988), (federal statutes exempt gasoline to be used for other purposes as well, *id.* §§ 6421(a), 6421(b)), the *Gurley* Court nevertheless held that "*this is not proof that Congress laid the tax on the ultimate consumer*," 421 U.S. at 206 (emphasis added), but simply reflects an extrinsic policy choice, *id.*

3. The statutory modifications now pending before the Oklahoma legislature, *infra* at 1a-23a, would squarely place the legal incidence of the state's fuel tax on ultimate consumers, and Proposition I in this brief addresses the consequences of its adoption, *supra* at 10-13. *But should that legislation be rejected*, the Chickasaw Nation respectfully submits that in light of that legislature's awareness of the court of appeals' decision below (and the central position of the "legal incidence" question before this Court), such a decision would further support a proposition advanced by the Chickasaw Nation earlier in this litigation: that the state's legislature intends "for the incidence of the tax to fall on the fuel retailer for reasons wholly unrelated to the Indian-law issues presented by the instant case," Br. in Opp. 6-7. *See generally, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 586 (1952) (drawing inference of intent from legislative rejection of on-point legislative proposal).

In sum, Petitioner's new argument that the legal incidence of the fuel tax is on consumers is as incorrect as the opposite argument it pursued for the three years before this case reached this Court, and may well, if accepted, generate absurd consequences in the application of that taxation scheme, *see supra* at 26 n.22. The court of appeals, "fairly interpreting" Oklahoma's complex and lengthy scheme *as a whole*, not only applied the correct standard, but correctly determined that the legal incidence of the state's fuel tax falls on retailers.

D. This Court Should Maintain Its Adherence to the *Per Se* Rule Precluding the Imposition of State Taxes on Indian Tribes Regarding Their Activities Within Indian Country.

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), this Court stated unequivocally:

> *In the special area of state taxation of Indian tribes* and tribal members, we have adopted a *per se* rule. In *Montana v. Blackfeet Tribe*, 471 U.S. 759 (1985), we held that Montana could not tax the tribe's royalty interest in oil and gas leases issued to non-Indian lessees. . . . We stated: "In keeping with its plenary authority over Indian affairs, *Congress can authorize the imposition of state taxes on Indian tribes* and individual Indians. It has not done so often, and *the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear.*" . . . Accordingly, *it is unnecessary to rebalance . . . interests in every case.*

Id. at 215 n.17 (emphasis added); *see also County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 267 (1992) (citation omitted) ("Balancing of interests is not the appropriate gauge . . . since it is that very balancing which we have reserved to Congress.").

One proposition which is unmistakably clear as a consequence of the above is that *assertions of state taxation jurisdiction over the activities of Indian tribes in Indian country are tested by a standard of judicial review which is different* from the standard applicable to assertions of state *regulatory* jurisdiction (or applications of state taxation jurisdiction to *nonmembers*) in like circumstances. In the former case, a *per se* rule precludes *taxation* of tribal activities absent congressional consent; in the latter, state *regulation* (or taxation of *nonmembers*) may be permissible (absent "normal" preemption) pursuant to application of the "infringement" principle or the "preemption/balancing"[28] test. The Tax Commission mounts a three-pronged attack on that result.

1. First, seizing upon every instance known to the Chickasaw Nation in which this Court substituted "presumption" for "*per se* rule" (or added the word "generally" to its formulation), Pet. Br. 19-20, the Tax Commission attempts to persuade this Court that the *per se* rule is not a *per se* rule at all, but rather a "presumption" which is rebuttable *upon a showing by the state that its interests outbalance the interests of the Tribe*, *see id.* at 14-18. Its argument, however, is too clever by half: how the Tax Commission can simultaneously argue that proposition and maintain that *it agrees*, *id.* at 21,

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[28] As this Court is well aware, "normal" statutory (or treaty) "preemption," *see generally* U.S. CONST. art. VI, cl. 2 (supremacy clause); *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986) (discussing "normal" preemption), and the "preemption/balancing" test which evolved from *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172-73 (1973), *see, e.g.*, *Cabazon Band*, 480 U.S. at 216-21, and which requires the balancing of federal, tribal, and state interests, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980), are two very different things. *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983) ("Although a State will certainly be without jurisdiction if its authority is pre-empted under familiar principles of pre-emption, we cautioned that our prior cases did not limit pre-emption of state laws affecting Indian tribes to only those circumstances.").

with this Court's statement that "it is unnecessary to rebalance . . . interests in every case," *id.* (quoting *Cabazon Band*), is a paradox that perhaps only the Tax Commission can resolve.[29]

Moreover, the Tax Commission would apparently have this Court "rebalance" interests only where a *state* attempts to convince a court that its interests are exceptionally weighty. Where a *tribe's* interests are comparably weighty, the Tax Commission is perfectly satisfied to leave the *per se* rule just the way it is. Pet. Br. 22 (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989)) ("[A] state tax is not invalid simply because it affects the tribal treasury . . . even where 'the economic impact' on the Tribe 'is particularly severe.' ").

Thus does the Tax Commission's proffered formulation collapse into incoherence. But this Court's own interpretations of the *per se* rule demonstrate what the "presumption" *really* is: a presumption rebuttable *only* by a showing that Congress has by statute abrogated the tribal immunity, *and "has made its intention to do so unmistakably clear."* *Cabazon Band*, 480 U.S. at 215 n.17 (emphasis added);[30] *see also*,

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[29] Nor is the Tax Commission's attempt to engraft the "compelling state interest" component of strict scrutiny, Pet. Br. 22, availing in any attempt to resolve the enigma. That approach, which would require courts to do no more than evaluate and *characterize* the magnitude of state (but apparently not tribal, *see infra* at 34) interests in applying the balancing test, would amount to no more than balancing with a "finger on the scale." *Compare* Pet. Br. 22 *with, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (factoring into otherwise-apposite dormant commerce clause balancing test the degree to which state interests "could be promoted as well with a lesser impact on interstate activities").

[30] While the Chickasaw Nation has earlier established that the Hayden-Cartwright issue is not properly before this Court, *supra* at 15-18, and has consequently not briefed that issue, even the most cursory examination of that statute, 4 U.S.C. § 104, reveals that it is anything but an "unmistakably clear" expression of congressional intent to abrogate the tribal immunity discussed in the instant subsection of this brief.

e.g., *supra* at 20-21 & n.18 (discussing *Milhelm Attea*); Br. in Opp. 23-24 (citing caselaw).

2. Second, the Tax Commission attempts to persuade this Court that "preemption/balancing" is the standard of review applicable herein by citation to numerous of this Court's cases in which it unsurprisingly applied that test to attempted exercises of state *regulatory* jurisdiction in Indian country, or to state attempts to tax entities *other than* tribes or tribal members regarding their Indian-country activities. See Pet. Br. 15-17. (Such entities, of course, are not protected by the *per se* rule in any case.)[31] This Court will quickly discover that of the thirteen cases the Tax Commission invokes to support the applicability of "preemption/balancing" herein, *id.*, only one – *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973) – involved a state attempt to tax the Indian-country activities of tribes or tribal members, and the *McClanahan* Court *unanimously invoked and applied the* per se *rule*. *Id.* at 170-71.

3. Third, the Tax Commission attempts to dismiss this Court's *Cabazon Band* formulation of the *per se* rule as dictum, Pet. Br. 21 n.8, expressing a preference for its *McClanahan* formulation (which was limited to taxes on Indian lands or income), *id.* at 20. Any broader consequences of the *per se* rule, it explains, must have been terminated with the demise of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), and the "federal instrumentality" doctrine. Pet. Br. 20-21. But the Tax Commission's attempt to create a limiting linkage between the sweep of the modern *per se* rule and the

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[31] The Chickasaw Nation has earlier noted that "Indian traders" enjoy an analogous immunity, *see* Br. in Opp. 15 n.10, but in those cases the immunity is the result of "normal" preemption, *e.g.*, *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160, 165 (1980) ("It is the existence of the Indian trader statutes . . . that preempts the field of transactions with Indians occurring on reservations."), and not the *per se* rule.

scope of rule as it existed during the federal instrumentality period *has been expressly rejected by this Court.*

In *McClanahan*, for example, this Court was well aware that the federal instrumentality doctrine had already been "sharply limited with respect to Indians," 411 U.S. at 170 n.5, but applied the *per se* rule to state taxation of individual Indians despite the fact that it simultaneously recognized that the federal instrumentality doctrine "may well be inapplicable in a case such as this involving an individual income tax," *id.* at 169-70.[32] In short, while its roots were established during the federal instrumentality period, the modern *per se* rule has a sweep far broader than that appurtenant to the former federal-instrumentality rule. In addition to *McClanahan*, this Court's still-more-recent jurisprudence continues to confirm that fact. *E.g.*, *Bryan v. Itasca County*, 426 U.S. 373, 377 (1976) (applying *per se* rule to state personal property tax); *Moe*, 425 U.S. at 475-80 (applying *per se* rule to state personal property and vendor license taxes).[33] As the following paragraphs indicate, there are excellent reasons for that result.

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[32] Rosalind McClanahan, the Appellant in *McClanahan*, made no allegation that the income in question was derived from employment by the Tribe. *E.g.*, Brief for Appellant at 5, *McClanahan*, 411 U.S. 164 (No. 71-834). *Compare id. with, e.g., Dobbins v. Commissioners of Erie County*, 41 U.S. (16 Pet.) 435 (1842) (invalidating state tax on income of employee *of the federal government*).

[33] In *Moe*, it may be noted, this Court also expressly rejected a state contention similar to one proffered by the Tax Commission, *compare Moe*, 425 U.S. at 476 *with* Pet. Br. 27 ("[I]t is the existence of state-funded public highways that makes possible the Tribe's sale of fuel. . . . "), which maintained that the provision of state services to tribes or their members affected the applicability of the *per se* rule to state taxes challenged therein, *Moe* 425 U.S. at 476. As was the case with the Salish and Kootenai Tribes, the federal government also makes substantial payments to Respondent, and as the facts of this case, inter alia, indicate, the Chickasaw Nation's own income contributes significantly to its economic well-being.

On a related matter, the Tax Commission correctly notes that at the commencement of this litigation in 1991, the parties stipulated that "the Tribe does not construct or maintain roads or highways for the use of the

4. It should require no citation of authority for this Court to take notice of the fact that the Indian-law field is one of the most complex areas of American law. And while the Chickasaw Nation vigorously maintains that the century-and-a-quarter-old, *see* Pet. Br. 20 (citing cases), *per se* rule *is* "settled right," both this Court and its Justices have often invoked the principle that "in most matters it is more important that the applicable rule of law be settled than that it be settled right." *E.g.*, *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting). The Indian-law field, replete with federal-common-law and quasi-constitutional principles (and a sporadic overlay of federal statutes), is laden with arcane subtleties, and presents a more patent need for predictability than many if not most other areas of law. The *per se* rule component of the Indian-law field is settled. *Supra* at 32-36; States' Br. 1-2.

Even the Tax Commission has purported to be concerned with predictability in the state-taxation arena, Pet. 8; Pet. Br. 30, and eleven of the largest Indian-country states have found

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general public in Oklahoma," Pet. Br. 28, going on to assert that the state expends about $300 million of its own fuel-tax funds in such endeavors, *id.* The Chickasaw Nation accepts the latter assertion, and the former stipulation was correct when it was entered into *in 1991* (though the *Bureau of Indian Affairs* expended substantial revenues toward such projects even then). But in the ensuing four years *since* 1991, the Chickasaw Nation has now contracted with the BIA for *its own* road and bridge construction and maintenance projects, *e.g.*, CONTRACT NO. CT G03 T 906 11 (FY 1994), Amendment 94-1 (Bureau of Indian Affairs-Chickasaw Nation) (May 20, 1994) (lodged with this Court), and such funds are employed to "match" state and county revenues for public roads. Other Oklahoma tribes have done likewise. *See, e.g.*, *Road Improvements Being Accomplished, Thanks to Choctaw Nation*, BISHINK (Durant, Oklahoma), February 1995, at 1, 6 (describing Choctaw road projects totalling over $13 million). Moreover, the tribal legislation which established the Chickasaw Nation's equivalent motor fuel tax, see *supra* at 8, expressly authorizes the expenditure of such revenues for cooperative road (and other) projects with state and local governments, CHICKASAW NATION CODE, tit. 10, § 10- 605 (1994), *reprinted in* Resp. to Applic. for Stay App. A (No. A-227), at 2.

the *per se* rule to "provide a reasonably bright-line standard," States' Br. 2, lessening the need to engage in "time- and resource-consuming litigation," *id.* at 1. Nor do those states suggest that the settled rule is unfair, or that it derived from badly-reasoned case law, or that it is otherwise unworkable. For those reasons *alone*, the Chickasaw Nation respectfully submits that the rule should be left alone. *See generally County of Yakima*, 502 U.S. at 268 ("For reasons of practicality, as well as text, we adhere to our *per se* approach.").

5. But there is yet another reason why the *per se* rule should not be abandoned: this Court has long been reluctant to abandon its own articulated doctrines in nonconstitutional matters remediable by Congress upon a perception by that body that the settled rule was or was becoming unsatisfactory. *E.g.*, *Citizen Band Potawatomi*, 498 U.S. at 510. Congress has been aware of the *Cabazon Band* formulation of the *per se* rule since 1987, aware of the *Blackfeet Tribe* formulation for a decade, aware of *Moe's* "legal incidence of the tax" approach for two, and aware of the former consequences of applying "federal instrumentality" analysis to Indian tribes since shortly after the Civil War, but has not acted to reverse the "presumption," see *supra* at 33-35, established by that rule. Moreover, the "available congressional remedy" analysis is taken to new heights in the instant case, in which the *Oklahoma* legislature can (and may well, *see supra* at 10-12) remedy any detrimental consequences of the *per se* rule which *it* perceives, *without any help from this Court.*[34]

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[34] The Tax Commission's protestations concerning the inadequacy of that remedy, see Pet. Br. 30, need not long detain this Court. First, the Chickasaw Nation has already researched the fuel-tax schemes of the twelve largest Indian-country states, and all save Oklahoma *already* impose the legal incidence of such taxes either on wholesalers or consumers. Br. in Opp. 5-6 n.5. Thus, tribal sovereign immunity presents no problem to those states, four of whom, it may be noted, have appeared in this litigation in part to *defend* the continued vitality of the *per se* rule, States' Br. 1-3. Seven *other* states with large amounts of Indian country or

E. Since the "Preemption/Balancing" Test Is Inapposite to State Attempts to Apply *Taxation* Jurisdiction to Indian Tribes, the Tax Commission's Argumentation Under that Test Is Irrelevant.

The Tax Commission, unsatisfied with the consequences of applying the *per se* rule to its motor fuel tax, devotes twenty-one pages of its twenty-eight page fuel-tax argument to defending the applicability of the preemption/balancing test herein, and applying that test to its motor fuel tax.[35] *Compare* Pet. Br. 12-23, 25-33 (arguing relevance of or attempting to apply preemption/balancing test) *with id.* at 12-39 (entirety of Tax Commission's fuel-tax argument). But since that argumentation is pursuant to an inapplicable standard of review, it collapses along with the Tax Commission's contention that this Court should apply the preemption/balancing test to its motor fuel tax. That conclusion, in turn, leads to a further one, which may streamline analysis herein: *two-thirds of the Tax Commission's Brief-in-Chief*, see Pet. Br. 12-33 (excluding its Statement and Summary, *id.* at 1-11), *is irrelevant to the disposition of this case.*

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large numbers of tribal members have also taken the same position. *Id.* Second, the Tax Commission's speculation that tribes might become fuel distributors is not only speculative but irrelevant, since imposing the legal incidence of fuel taxes on consumers would solve that problem as well. And third, while *Oklahoma's* $16,000 per month loss during the last several months, *see* Resp. to Applic. for Stay 18 (No. A-227), (out of total revenues exceeding $1 billion, *id.* App. C), is permanent due to tribal sovereign immunity, Oklahoma could truncate such losses (with respect to sales to nonmembers) *tomorrow morning* by adopting the legislation discussed *supra* in Proposition I.

[35] The residuum of the Tax Commission's fuel-tax argument consists of its eleventh-hour, three-paragraph Hayden-Cartwright contention, Pet. Br. 23-24; and its contention that the legal incidence of its fuel tax falls on consumers (or wholesalers), *id.* at 33-39. Only the last of these contentions is relevant to the dispute now before this Court. *Supra* at 15-18; *infra* at 39.

F. Irrespective of Where the Legal Incidence of Oklahoma's Motor Fuel Tax Falls, this Court Has Long Adhered to a Principle Precluding State Taxation on Indian-Country Sales to Tribal Members.

This Court's *per se* rule applies not only to Indian-country activities of tribes, but to such activities of tribal members as well. *E.g.*, *Cabazon Band*, 480 U.S. at 215 n.17. Pursuant to that approach, numerous decisions of this Court, including its series of "smokeshop" decisions, have rejected state attempts to tax purchases of goods by members in Indian country even where the legal incidence of the apposite state tax fell on ultimate consumers. *E.g.*, *Colville*, 447 U.S. at 158; *Moe*, 425 U.S. at 475-81. Conspicuously absent from those decisions is any requirement that the goods be consumed (or, for that matter, that the tax-exempt income be spent, see *McClanahan*, 411 U.S. 164), in Indian country.

The Tax Commission attempts to distinguish *Moe* and *Colville* in three paragraphs, Pet. Br. 32-33, and the Chickasaw Nation will give separate attention to each. Its first re-invokes its Hayden-Cartwright contention, which the Chickasaw Nation has noted earlier is not properly before this Court, *supra* at 15-18. Its second, as that paragraph's sole citations to the "preemption/balancing" section of the Tax Commission's own brief and *Rice v. Rehner*, 463 U.S. 713 (1983), Pet. Br. 32, indicate,[36] attempts to re-invoke and apply the manifestly inapplicable, *supra* at 32-38, preemption/balancing test.

The final paragraph of the Tax Commission's argument regarding tribal members, see Pet. Br. 33, maintains that "[i]n both *Sac and Fox* and *Colville*, the Court *suggested*," *id.*

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[36] As this Court well knows, *Rice* was a state *regulatory* jurisdiction case, 463 U.S. at 715, in which this Court applied both "normal" preemption and the "preemption/balancing" test, *id.* at 719-35. *See generally supra* at 33 (acknowledging applicability of "preemption/balancing" test to state assertions of *regulatory* jurisdiction).

(emphasis added), that various state taxes might be opposable to tribal members if such taxes were "tailored" to off-reservation use, *id.* But the very passages relied upon by the Tax Commission provide the answer to its claim. In *Sac & Fox* (quoting *Colville*), this Court unanimously stated:

> As we said in *Colville*, had the State "tailored its tax to the amount of actual off-[Indian country] use, . . . this *might* be a different case. *But it has not done so, and we decline to treat the case as if it had.*"

113 S.Ct. at 1993 (emphasis added) (citation omitted) (bracketed material in original).

Oklahoma has not "tailored" its fuel taxes – as applied to Indian-country purchases by tribal members – to the amount of use outside of Indian country. Had it done so, this *might* (or might not) be a different case. *But it has not done so*, and the Chickasaw Nation respectfully submits that this Court should follow the path it established in *Sac & Fox* and *Colville*, and "decline to treat the case as if it had." *Sac & Fox*, 113 S.Ct. at 1993 (quoting *Colville*, 447 U.S. at 164).

IV. RELEVANT TREATIES PRECLUDE THE IMPOSITION OF OKLAHOMA'S INCOME TAX ON THE INCOME OF CHICKASAW MEMBERS EMPLOYED DIRECTLY BY THE TRIBAL GOVERNMENT WITHIN ITS INDIAN COUNTRY, WHETHER OR NOT SUCH MEMBERS RESIDE WITHIN INDIAN COUNTRY.

At the outset, the sole income-tax question which this case presents to this Court must be stated with great precision: it is whether the Treaty of Dancing Rabbit Creek between the United States and the Choctaw Nation, Treaty of Sept. 27, 1830, 7 Stat. 333, later applied to the Chickasaw Nation and still later reaffirmed by Congress, *supra* at 6, precludes state taxation of the income of member employees of the *government* of the Chickasaw Nation who work within, but reside outside of Chickasaw Indian country. Br. in Opp.

2-3 & nn. 2-4; Pet. App. 31a.[37] The court of appeals held that it did. *Id.*

1. For well-known reasons, this Court has long held that canons of construction require that treaties protecting tribal rights be construed in the manner most favorable to the tribe. *E.g.*, *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (citing cases). It has applied that same principle to federal statutes. *E.g.*, *County of Yakima*, 502 U.S. at 269 (citing cases).

2. The Chickasaw Nation has described both the history leading up to the Treaty of Dancing Rabbit Creek, and the circumstances under which it became a beneficiary to that treaty's guarantees, in some detail in its Statement of the Case. See *supra* at 1-6. Whether because Choctaw lands were exceptionally vital to the United States, *supra* at 2; or because of the high level of cultural and political development of the Five Tribes, *supra* at 1-2; or because of the persistence of John C. Calhoun in pursuing, during the early part of his second term as Vice-President, his earlier policy of focusing on the Choctaw Nation as the first major tribe to be finally (and "voluntarily") removed to the West, *supra* at 2-3; or because of Choctaw willingness to be the first such Tribe so to do, *supra* at 5; or because of genuine concerns by Secretary of War John Eaton, the United States' representative in the Choctaw treaty negotiations, for the preservation of certain tribal cultures and self-government, *supra* at 4 & n.5; or because of the persistence of Choctaw negotiators, *supra* at 5; or because Congress had only two years earlier rejected forcible removal of the Choctaws, *supra* at 3, or because the

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[37] This Court recently declined to decide whether state taxation of the income of tribal members employed by their tribal government, but residing outside Indian country, is precluded as to *all* tribes by the "infringement" principle of *Williams v. Lee*, 358 U.S. 217, 220 (1959). *Sac & Fox*, 113 S.Ct. at 1992. But as in *Sac & Fox*, that question was neither briefed nor argued below, Br. in Opp. 10 & n.8, and neither party has briefed it to this Court.

United States was willing to give the Choctaws favorable terms in order to ameliorate militant land demands from the citizens of Mississippi, *supra* at 2-3, or because of residual gratitude toward the Choctaws by President Andrew Jackson for the vitally-important role Choctaw warriors played in assisting him during the War of 1812, *supra* at 2 n.2, or for other reasons, one fact concerning the Treaty of Dancing Rabbit Creek is indisputable. *In that treaty, the United States and the Choctaw Nation negotiated terms more favorable to the Tribe than appeared in any previous Indian treaty in the history of the United States. Supra* at 5. The Tax Commission would have this Court construe the most important of those guarantees – perhaps the *sole* remaining treaty guarantee enjoyed by the Chickasaw and Choctaw Nations – dead letter.[38]

The Chickasaw Nation has quoted Article IV of that treaty *verbatim* in its Statement of the Case. See *supra* at 5-6. The portion of Article IV of greatest relevance for present purposes provides:

> The Government and people of the United States are hereby obliged to secure the said Choctaw Nation of Red People the jurisdiction and government of all persons and property that may be within their limits west,[39] so that no Territory or

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[38] The Tax Commission's untenable construction of the treaty, which would have this Court read Article IV's "government clause" as "barring state laws that govern the Chickasaw in a manner that *displaces the mechanisms* of tribal government in Indian country," Pet. Br. 42 (emphasis added), is actually *less* protective of tribal interests than the "infringement" standard already applicable to *all* tribes pursuant, inter alia, to *Williams v. Lee*, 358 U.S. 217, 220 (1959).

[39] Petitioner has attempted to employ this clause to limit the express and unequivocal guarantee which immediately follows. Pet. Br. 43. But apart from the impact of the canons of construction on such argumentation, later cases have made clear that tribes possess sovereignty over both their territories and their members, *United States v. Wheeler*, 435 U.S. 313, 323

> State shall ever have a right to pass laws for the *government* of the Choctaw Nation of Red People and their descendants. . . .

7 Stat. at 334 (emphasis added).[40]

3. All nonresident member employees as to whom the court of appeals found the income tax non-opposable are employed directly by the tribal *government*. To be sure, while many are employed in what might be characterized as the performance of "traditional" governmental functions, *but cf. Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 538-45 (1985) (finding that the "governmental/proprietary" distinction could not be satisfactorily drawn), others are employed in tribal enterprises. But they are all directly employed *by their government*, and in light of the historic congressional policy strongly promoting not only tribal self-determination but also self-*sufficiency*, *see, e.g., Cabazon Band*, 480 U.S. 216-17 & nn.19-20 (citing statutes and Presidential statements), Respondent respectfully urges this Court to recognize that while neither the federal government nor states regularly engage in entrepreneurial activities, *that precisely what Congress and the President have urged Indian tribal governments to do*. The functions of tribal "governments," in short, are different from those of the

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(1978), and this Court has held that it will not "strain to implement" Indian policies which "Congress has now rejected," *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 527 (1986). Even as a wholly textual matter, the guarantee is provided to the tribal *government* wherever that government exercises jurisdiction, and all member employees at issue in this case performed their duties *within Chickasaw territory*.

[40] In its Brief in Opposition, the Chickasaw Nation agreed with the Tax Commission that two other Oklahoma tribes, the Muscogee (Creek) Nation and the Seminole Nation (which, along with the Chickasaw and Choctaw Nations, comprise four of what were formerly known as the Five Civilized Tribes) have similar treaty guarantees, Br. in Opp. 28, but represented to this Court that, based on substantial research, it could find no others. *Id.* at 8-9. The Tax Commission has pointed to no others in its Brief-in-Chief. See Pet. Br. *passim*.

federal and state governments. Moreover, since this Court has been unable to draw a bright-line "governmental/proprietary" distinction well into the twentieth century, *Garcia*, 469 U.S. at 538-45, it cannot be assumed that the Indian signatories to the Treaty of Dancing Rabbit Creek – *all of whom signed that document by making an "x," see* 7 Stat. 333, 342 (1830) – would have understood "government" in the crabbed sense proffered by the Tax Commission, see *supra* at 43 n.38, one hundred and sixty-five years ago.

4. As a wholly textual matter, "government" includes both the *process* of governance and the *structure* through which governance is achieved, OXFORD ENGLISH DICTIONARY 1181-82 (compact ed. 1971). By necessitating the payment of wages higher than would be required absent state taxation thereof, such taxation increases the cost (and consequently reduces the efficacy) of tribal government (both as a process and as an institution).

Apart from the dictionary definition, the Chickasaw Nation maintains that both the canons of construction and the historical origins of the treaty's "government clause" should inform the application of that clause.[41] So understood, both

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[41] The Tax Commission's textual analysis, however, gives not the slightest nod to the canons, which require, inter alia, that treaty provisions be construed as the tribal signatories would have understood them at the time, *e.g.*, *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970); *United States v. Winans*, 198 U.S. 371, 380-81 (1905). Rather, it bases its textual argumentation on *contemporary* American usage and law, Pet. Br. 42 ("One would not . . . characterize a state income tax . . . on a federal employee . . . as passed 'for the government of the United States.' "); *id.* at 43 (citation omitted) (emphasis added) ("The theory . . . that a tax on income is . . . a tax on its source, is *no longer* tenable."), while failing to note that when the Treaty of Dancing Rabbit Creek was signed *in 1830*, precisely the *opposite* interpretations prevailed, *even among non-Indians*, *see, e.g.*, *Dobbins v. Commissioners of Erie County*, 41 U.S. (16 Pet.) 435 (1842) (invalidating state tax on income of federal employee under now-superceded "federal instrumentality" doctrine). Thus, not only did the *tribal* signatories to that treaty – who may or may not have been aware of

the canons and the state of extrinsic case law in 1830 provide support beyond text and history for the Chickasaw Nation's even-more-particularized contention that the treaty's "government clause" shields from state taxation the income of member employees of its government. *Supra* at 45-46 n.41.

5. Apart from the argumentation rebutted in footnotes 39 and 41 above, the Tax Commission maintains three lines of defense against that conclusion. Its first invokes *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 168 (1973), and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980), for the general (*i.e.*, absent treaty guarantee) proposition that tribal interests in remaining free of state jurisdiction are "most significant when 'on-reservation *conduct including only Indians* is at issue.' " Pet. Br. 44 (emphasis added). But even in the limited sense in which the Tax Commission tenders it, that observation actually backfires as applied to the income-tax question herein, since all relevant "conduct" involves service *by* member employees, *for* the tribal government, *in* Indian country.[42]

Second, in a *reductio ad absurdum* approach, the Tax Commission maintains that by the Chickasaw Nation's reasoning, the income of *nonmember* governmental employees should also be shielded from state taxation, and

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cases such as *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and its progeny, but who were certainly aware of the broad functions which the Choctaw government then performed, *e.g.*, DEROSIER, *supra*, at 7-13; Grayson Noley, *The Early 1700s: Education, Economics, and Politics, in* THE CHOCTAW BEFORE REMOVAL 73, 76-114 (Carolyn K. Reeves ed., 1985) – likely construe the "government clause" of that treaty to include broad immunities of member employees from state taxation, but it is also probable that the United States' negotiators (and Congress) had a similar understanding as well.

[42] The Chickasaw Nation, in a different context, has noted above that the Tax Commission's ancillary argument that provision of some state services to tribal members (which it advances in the income tax as well as the fuel-tax context, see Pet. Br. 47) somehow changes that calculus has also been rejected by this Court. *See supra* at 36 n.33.

tribal members should be shielded from all state laws wherever they may travel within the United States. Pet. Br. 44. But the court of appeals rejected the former proposition, and the Chickasaw Nation is aware that for numerous reasons, see, *e.g.*, *supra* at 46 (discussing *Jones* and *Bracker*), such a claim is substantially more tenuous than its claim regarding member employees. Thus, it did not seek certiorari on that issue: the consequence of that decision, in turn, is that the court of appeals' resolution thereof is now the law of the Tenth Circuit, where all the tribes enjoying similar treaty guarantees reside, *supra* at 44 n.40. And as to the latter proposition, the Chickasaw Nation notes both that it tenders no extravagant claim under the "government clause" herein, and that the sole alternative to construing a treaty guarantee to absurd proportions is *not* to construe such a guarantee as having no meaning at all.

Third, the Tax Commission contends that the treaty's "government clause" was abrogated by implication when the following clause in the treaty, which guarantees that Choctaw [and Chickasaw] lands would never be "embraced in any . . . State," was validly, *cf. The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1871) (upholding statutory abrogation of Indian treaty provision), abrogated upon the admission of Oklahoma as a state. Pet. Br. 45-47. But apart from the fact that abrogations-by-implication are disfavored, *e.g. United States v. Dion*, 476 U.S. 734, 739 (1986) (emphasis added) ("absent *explicit* statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights. . . . "), the Tax Commission's construction would render the treaty's "government clause" mere redundant surplusage, since there would be no point in shielding tribal government from state law *if the Tribe would never be within a state to begin with*. While the Tax Commission's proffered interpretation would render the "government clause" – which is stated as an *independent* promise – no more than a "cruel joke," see *United States v. John*, 437 U.S. 634, 653 (1978), the Chickasaw Nation's, by

contrast, breathes meaning into *each*. *See generally County of Yakima*, 502 U.S. at 265 ("Judges 'are not at liberty to pick and choose among congressional enactments, and when two . . . statutes[43] are capable of co-existence it is the duty of the courts, absent a clearly expressed congressional intention to the contrary,[44] to regard each as effective.' ").

Apart from the sweep of its substantive guarantees, the Treaty of Dancing Rabbit Creek has a procedural feature which is also virtually unique (if not unique) among all Indian treaties: its *text* provides that ambiguities are to be resolved in favor of the Tribe. Treaty of Sept. 27, 1830, art. XVIII, 7 Stat. 333, 336. The Chickasaw Nation respectfully submits that this Court should construe that text to shield member employees of the tribal government from state income taxation, where their income is earned within Chickasaw Indian country.

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[43] Absent clear congressional abrogation, *supra* at 47 (quoting *Dion*), in-force *treaty* provisions have no less preemptive effect than federal statutes, U.S. CONST. art. VI, cl. 2. The Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 267 (1906), *is* a federal statute, albeit pursuant to Congress' Article IV (rather than Article I) powers, *see* U.S. CONST. art. IV, § 3, cl. 1. As such, it may be further noted, it is also subject to the canons of construction described above, see *supra* at 42.

[44] Far from evidencing an intent to abrogate Indian treaty rights, the Oklahoma Enabling Act protected Indian rights in its very first sentence, 34 Stat. 267, going on to require the people of the proposed state to "agree and declare that they forever disclaim all right and title to . . . all lands lying within said limits owned or held by any Indian, tribe, or nation. . . . " 34 Stat. 269. While the Chickasaw Nation does not maintain that those provisions preempt state taxation of the income of its member employees, they nevertheless bear powerful witness against the Tax Commission's contention that Congress intended to repeal the "government clause" of the Treaty of Dancing Rabbit Creek by implication upon the admission of Oklahoma as a state.

CONCLUSION

Should the Oklahoma legislature reject the pending legislation discussed in Proposition I, see *supra* at 10-13, the court of appeals' decision should be affirmed in all respects. But should that legislation be adopted, this Court should affirm regarding the application of the state's fuel tax to tribal members, affirm on the third Question Presented, and dismiss the Writ as improvidently granted on all other issues herein.

Respectfully submitted,

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APPENDIX

HOUSE OF REPRESENTATIVES
1st Session of the 45th Legislature (1995)

REVENUE AND TAXATION COMMITTEE

STAFF REPORT
Representative Howard Cotner, Chairman
Representative Rou Langmacher, Vice Chairman

MEASURE:	Committee Substitute for House Bill 1522
SUBJECT:	Motor Fuel Tax
AUTHOR:	Representative Cotner
PROVISIONS:	1. Clarifies that it is the purpose and intent of the various gasoline and diesel fuel tax levies that the tax shall be a levy and assessment on the consumer and the levy and assessment on other persons shall be as agents for this state for the collection of the tax. 2. Eliminates references to the distributor remitting motor fuel taxes on behalf of a licensed retailer of the distributor. 3. Exempts from motor fuel tax sales of motor fuel and diesel fuel to federally recognized Indian tribes for use in tribally owned vehicles used exclusively for governmental purposes. Provides that these tribes shall be issued a tax exemption certificate from the Tax Commission for that portion of the fuel that is exempt.
EFFECTIVE DATE:	Emergency Clause

HOUSE OF REPRESENTATIVES
Thursday, February 23, 1995

Committee Substitute for
House Bill No. 1522*

COMMITTEE SUBSTITUTE FOR HOUSE BILL NO. 1522 – By COTNER, SULLIVAN (John) and THORNBRUGH of the House and HOBSON of the Senate.

An Act relating to revenue and taxation; amending 68 O.S. 1991, Sections 502, 502.1, 502.2, 502.3, 502.4, 502.5, 502.6 and 502.7, which relate to the levy of taxes on motor fuels; clarifying purpose and intent of gasoline and diesel fuel tax levies; amending 68 O.S. 1991, Section 505, as amended by Section 16, Chapter 146, O.S.L. 1993 (68 O.S. Supp. 1994, Section 505), which relates to due date and remittance of tax, reports and penalties; deleting certain reference to licensed retailer; amending 68 O.S. 1991, Sections 516, 520, 522 and 522.1, which relate to additional gasoline, diesel and other fuels taxes; clarifying purpose and intent of gasoline, diesel fuel and other fuel tax levies; amending 68 O.S. 1991, Section 527, as amended by Section 1, Chapter 300, O.S.L. 1992 (68 O.S. Supp. 1994, Section 527), which relates to exemptions from state tax; providing exemption from certain taxes for federally recognized Indian tribes; requiring certain

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*The pending legislation is reproduced from the printed text verbatim. This Court should be aware that in the style employed by the Oklahoma House of Representatives, capitalized language denotes amendments to current statutes; bold face capitalized language denotes committee amendments, and bracketed bold face language denotes deletions from current statutes.

certificate to be issued to federally recognized Indian tribes; and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 68 O.S. 1991, Section 502, is amended to read as follows:

Section 502. There is hereby levied an excise tax of four cents ($0.04) per gallon upon the sale of each and every gallon of gasoline sold, or stored and distributed, or withdrawn from storage, within the state, for sale or use, to be reported and collected as provided by law [; **provided, that ninety-seven**]. IT IS THE PURPOSE AND INTENT OF THIS SECTION THAT THE TAX LEVIED ON GASOLINE PURSUANT TO THE PROVISIONS OF THIS ARTICLE SHALL BE A LEVY AND ASSESSMENT ON THE CONSUMER AND THE LEVY AND ASSESSMENT ON OTHER PERSONS AS SPECIFIED IN THIS ARTICLE SHALL BE AS AGENTS FOR THIS STATE FOR THE COLLECTION OF THE TAX. NINETY-SEVEN and one-half percent (97 1/2%) of the net gallonage reported for taxation, after all deductions allowed by law have been made, shall be the basis used in the computation of the amount of tax due[; **provided, further, no**]. NO gasoline shall be the basis more than once of the tax imposed by this section.

The tax shall be payable upon gasoline sold and delivered to, or used by the state or any political subdivision thereof.

SECTION 2. AMENDATORY 68 O.S. 1991, Section 502.1, is amended to read as follows:

Section 502.1 There is hereby levied an excise tax of five and one-half cents ($0.055) per gallon upon the sale of each and every gallon of diesel fuel sold within the state, to be reported and collected as provided by law [; **provided, that ninety-seven**]. IT IS THE PURPOSE AND INTENT OF THIS SECTION THAT THE TAX LEVIED ON DIESEL FUEL PURSUANT TO THE PROVISIONS OF THIS ARTICLE SHALL BE A LEVY AND ASSESSMENT ON THE CONSUMER AND THE LEVY AND ASSESSMENT ON OTHER PERSONS AS SPECIFIED IN THIS ARTICLE SHALL BE AS AGENTS OF THIS STATE FOR THE COLLECTION OF THE TAX. NINETY-SEVEN and one-half percent (97 1/2%) of the net gallonage reported for taxation, after all deductions allowed by law have been made, shall be the basis used in the computation of the amount of tax due[; **provided, further, no**]. NO diesel fuel shall be the basis more than once of the tax imposed by this section.

The tax shall be payable upon diesel fuel sold and delivered to or used by the state.

SECTION 3. AMENDATORY 68 O.S. 1991, Section 502.2, is amended to read as follows:

Section 502.2 A. In addition to the excise taxes levied by Sections 502, 516, 520 and 522 of [**Title 68 of the Oklahoma Statutes**] THIS TITLE, there is hereby levied an excise tax of two and forty-two one-hundredths cents ($0.0242) upon the sale of every gallon of gasoline sold, or stored and distributed, or withdrawn from storage within the state, for sale or use, which tax shall be reported and collected in the same manner as provided by law for the reporting and collecting of all other tax

levies upon the sale or use of gasoline within this state. Ninety-seven and one-half percent (97.5%) of the net gallonage reported to the Tax Commission for taxation, after all deductions allowed by law have been made, shall be the basis used in the computation of the amount of tax due. IT IS THE PURPOSE AND INTENT OF THIS SECTION THAT THE TAX LEVIED ON GASOLINE PURSUANT TO THE PROVISIONS OF THIS ARTICLE SHALL BE A LEVY AND ASSESSMENT ON THE CONSUMER AND THE LEVY AND ASSESSMENT ON OTHER PERSONS AS SPECIFIED IN THIS ARTICLE SHALL BE AS AGENTS OF THIS STATE FOR THE COLLECTION OF THE TAX.

B. Gasoline used exclusively by the United States and gasoline which is exempt from tax pursuant to the provisions of Sections 507, 508, 509 and 527 of **[Title 68 of the Oklahoma Statutes]** THIS TITLE shall be exempt from the tax levied pursuant to the provisions of this section.

C. The additional excise tax of two and forty-two one-hundredths cents ($0.0242) per gallon of gasoline levied in this section, together with any interest and penalties thereon, collected by the Oklahoma Tax Commission shall be apportioned monthly as follows:

Two cents ($0.02) of the two and forty-two one-hundredths cents ($0.0242), together with any interest land penalties thereon, shall be apportioned according to the provisions of Section 504 of **[Title 68 of the Oklahoma Statutes]** THIS TITLE.

Forty-two one-hundredths cents ($0.0042) of the two and forty-two one-hundredths cents ($0.0242), together

with any interest and penalties thereon, shall be deposited in the County Bridge Improvement Fund of the State Treasury to be used for the purposes set forth in the County Bridge Improvement Act.

SECTION 4. AMENDATORY 68 O.S. 1991, Section 502.3, is amended to read as follows:

Section 502.3 A. In addition to the excise tax levied by Sections 502.1 and 522.1 of **[Title 68 of the Oklahoma Statutes]** THIS TITLE, there is hereby levied an excise tax of two and one-half cents ($0.025) upon the sale of each gallon of diesel fuel sold, or stored and distributed, or withdrawn from storage, within the state, for sale or use, which shall be reported and collected in the same manner as provided by law for the reporting and collecting of all other tax levies upon the sale or use of diesel fuel within this state. The basis for computation of the amount due shall be ninety-seven and one-half percent (97.5%) of the net gallonage reported for taxation, after all deductions allowed by law have been made. IT IS THE PURPOSE AND INTENT OF THIS SECTION THAT THE TAX LEVIED ON DIESEL FUEL PURSUANT TO THE PROVISIONS OF THIS ARTICLE SHALL BE A LEVY AND ASSESSMENT ON THE CONSUMER AND THE LEVY AND ASSESSMENT ON OTHER PERSONS AS SPECIFIED IN THIS ARTICLE SHALL BE AS AGENTS OF THIS STATE FOR THE COLLECTION OF THE TAX.

B. Diesel fuel used exclusively by the United States and diesel fuel which is exempt from tax pursuant to the provisions of Sections 507, 508, 509 and 527 of **[Title 68 of the Oklahoma Statutes]** THIS TITLE shall be exempt

from the tax levied pursuant to the provision of this section.

C. The additional excise tax of two and one-half cents ($0.025) per gallon of diesel fuel levied in this section, together with any interest and penalties thereon, collected by the Oklahoma Tax Commission shall be apportioned monthly as follows:

Two cents ($0.02) of the two and one-half cents ($0.025), together with any interest and penalties thereon, shall be apportioned according to the provisions of paragraph 1 of Section 504.1 of **[Title 68 of the Oklahoma Statutes]** THIS TITLE.

One-half of one cent ($0.005) of the two and one-half cents ($0.025), together with any interest and penalties thereon, shall be deposited in the County Bridge Improvement Fund of the State Treasury to be used for the purposes set forth in the County Bridge Improvement Act.

SECTION 5. AMENDATORY 68 O.S. 1991, Section 502.4, is amended to read as follows:

Section 502.4 A. There is hereby levied an excise tax of one cent ($0.01) upon the sale of every gallon of gasoline sold, or stored and distributed, or withdrawn from storage within the state, for sale or use, which shall be reported and collected in the same manner as provided by law for the reporting and collecting of all other tax levies upon the sale or use of gasoline within this state. The basis for computation of the amount due shall be ninety-seven and one-half percent (97.5%) of the net gallonage reported to the Tax Commission for taxation,

after all deductions allowed by law have been made. IT IS THE PURPOSE AND INTENT OF THIS SECTION THAT THE TAX LEVIED ON GASOLINE PURSUANT TO THE PROVISIONS OF THIS ARTICLE SHALL BE A LEVY AND ASSESSMENT ON THE CONSUMER AND THE LEVY AND ASSESSMENT ON OTHER PERSONS AS SPECIFIED IN THIS ARTICLE SHALL BE AS AGENTS OF THIS STATE FOR THE COLLECTION OF THE TAX.

B. Gasoline used exclusively by the United States and gasoline which is exempt from tax pursuant to the provisions of Sections 507, 508, 509 and 527 of **[Title 68 of the Oklahoma Statutes]** THIS TITLE shall be exempt from the tax levied pursuant to the provisions of this section.

C. The additional excise tax of one cent ($0.01) per gallon of gasoline levied by this section, together with any interest and penalties thereon, collected by the Oklahoma Tax Commission shall be deposited in the County Road, Improvement Revolving Fund of the State Treasury to be used for the purposes set forth in the County Road Improvement Act.

SECTION 6. AMENDATORY 68 O.S. 1991, Section 502.5, is amended to read as follows:

Section 502.5 A. There is hereby levied an excise tax of one cent ($0.01) upon the sale of each gallon of diesel fuel sold, or stored and distributed, or withdrawn from storage, within the state, for sale or use, which shall be reported and collected in the same manner as provided by law for the reporting and collecting of all other tax levies upon the sale or use of diesel fuel within this state. The basis for computation of the amount due shall be

ninety-seven and one-half percent (97.5%) of the net gallonage reported to the Tax Commission for taxation, after all deductions allowed by law have been made. IT IS THE PURPOSE AND INTENT OF THIS SECTION THAT THE TAX LEVIED ON DIESEL FUEL PURSUANT TO THE PROVISIONS OF THIS ARTICLE SHALL BE A LEVY AND ASSESSMENT ON THE CONSUMER AND THE LEVY AND ASSESSMENT ON OTHER PERSONS AS SPECIFIED IN THIS ARTICLE SHALL BE AS AGENTS OF THIS STATE FOR THE COLLECTION OF THE TAX.

B. Diesel fuel used exclusively by the United States and diesel fuel which is exempt pursuant to the provisions of Sections 507, 508, 509 and 527 of **[Title 68 of the Oklahoma Statutes]** THIS TITLE shall be exempt from the tax levied pursuant to the provisions of this section.

C. The additional excise tax of one cent ($0.01) per gallon of diesel fuel levied by this section, together with any interest and penalties thereon, collected by the Oklahoma Tax Commission shall be deposited in the County Road Improvement Revolving Fund of the State Treasury to be used for the purposes set forth in the County Road Improvement Act.

SECTION 7. AMENDATORY 68 O.S. 1991, Section 502.6, is amended to read as follows:

Section 502.6 A. In addition to the excise taxes levied by Sections 502, 502.2, 502.4, 516, 520 and 522 of this title, there is hereby levied an excise tax of six cents ($0.06) upon the sale of every gallon of gasoline sold, or stored and distributed, or withdrawn from storage within the state, for sale or use, which shall be reported and collected in the same manner as provided by law for the

reporting and collecting of all other tax levies upon the sale or use of gasoline within this state. The basis for computation of the amount due shall be one hundred percent (100%) of the net gallonage reported to the Tax Commission for taxation, after all deductions allowed by law have been made. IT IS THE PURPOSE AND INTENT OF THIS SECTION THAT THE TAX LEVIED ON GASOLINE PURSUANT TO THE PROVISIONS OF THIS ARTICLE SHALL BE A LEVY AND ASSESSMENT ON THE CONSUMER AND THE LEVY AND ASSESSMENT ON OTHER PERSONS AS SPECIFIED IN THIS ARTICLE SHALL BE AS AGENTS OF THIS STATE FOR THE COLLECTION OF THE TAX.

B. Gasoline used exclusively by the United States and gasoline which is exempt from tax pursuant to the provisions of Sections 507, 508, 509 and 527 of this title shall be exempt from the tax levied pursuant to the provisions of this section.

C. It is hereby declared to be the intent of the Legislature that the total state excise tax, levied by this section and Sections 502, 502.2, 502.4, 516, 520 and 522 of this title, shall be sixteen cents ($0.16) upon the sale or use of each gallon of gasoline within this state and that no gasoline shall be subject to said total tax more than one time.

D. The additional excise tax of six cents ($0.06) per gallon of gasoline levied by this section, together with any interest, and penalties thereon, collected by the Oklahoma Tax Commission shall be apportioned monthly as follows:

1. Five cents ($0.05) of the six cents ($0.06), together with any interest and penalties thereon, shall be apportioned to the State Transportation Fund for any purpose provided for in Section 1502 of Title 69 of the Oklahoma Statutes; and

2. One cent ($0.01) of the six cents ($0.06), together with any interest and penalties thereon, shall be distributed to the various counties in the following manner: thirty percent (30%) based upon area, thirty percent (30%) based upon population according to the latest Federal Decennial Census or the most recent annual estimate provided by the U.S. Bureau of the Census and forty percent (40%) based upon county road mileage on the basis which the respective area, population and county road mileage of each county bear to the total area, population and county road mileage of the state. The funds so transmitted shall be sent to the respective county treasurers and by them deposited in the county highway fund to be used by the board of county commissioners for the purpose of construction, repair and maintenance of county roads and highways.

SECTION 8. AMENDATORY 68 O.S. 1991, Section 502.7, is amended to read as follows:

Section 502.7 A. In addition to the excise taxes levied by Sections 502.1, 502.3, 502.5 and 522.1 of this title, there is hereby levied an excise tax of three cents ($0.03) upon the sale of each gallon of diesel fuel sold, or stored and distributed, or withdrawn from storage, within the state, for sale or use, which shall be reported and collected in the same manner as provided by law for the reporting and collecting of all other tax levies upon the

sale or use of diesel fuel within this state. The basis for computation of the amount due shall be one hundred percent (100%) of the net gallonage reported to the Tax Commission for taxation, after all deductions allowed by law have been made. IT IS THE PURPOSE AND INTENT OF THIS SECTION THAT THE TAX LEVIED ON DIESEL FUEL PURSUANT TO THE PROVISIONS OF THIS ARTICLE SHALL BE A LEVY AND ASSESSMENT ON THE CONSUMER AND THE LEVY AND ASSESSMENT ON OTHER PERSONS AS SPECIFIED IN THIS ARTICLE SHALL BE AS AGENTS FOR THIS STATE FOR THE COLLECTION OF THE TAX.

B. Diesel fuel used exclusively by the United States and diesel fuel which is exempt from tax pursuant to the provisions of Sections 507, 508, 509 and 527 of this title shall be exempt from the tax levied pursuant to the provisions of this section.

C. It is hereby declared to be the intent of the Legislature that the total state excise tax levied by this section and Sections 502.1, 502.3, 502.5 and 522.1 of this title, shall be thirteen cents ($0.13) upon the sale or use of each gallon of diesel fuel within this state and that no diesel fuel shall be subject to said total tax more than one time.

D. The additional excise tax of three cents ($0.03) per gallon of diesel fuel levied by this section, together with any interest and penalties thereon, collected by the Oklahoma Tax Commission shall be apportioned monthly to the State Transportation Fund.

SECTION 9. AMENDATORY 68 O.S. 1991, Section 505, as amended by Section 16, Chapter 146,

O.S.L. 1993 (68 O.S. Supp. 1994, Section 505), is amended to read as follows:

Section 505. A. The tax levied by Sections 502, 502.1 and 522.1 of this title are due and payable on the first day of each month for the preceding calendar month, and if not paid on or before the twenty-fifth day of each month shall thereafter be delinquent.

B. Every distributor shall make and transmit to the Tax Commission on or before the twenty-fifth day of each calendar month, upon a form prescribed or furnished by the Tax Commission, an itemized and verified report showing the quantity of motor fuel, diesel fuel or blending material imported, produced, refined, manufactured, or compounded within this state, the number of gallons of motor fuel, diesel fuel or blending material received, as shown by the shipper's invoice thereof, by such distributor in this state, from any source during the preceding month, the number of gallons of motor fuel, diesel fuel or blending material purchased, received or accepted in this state in the original package or container in which same was imported into this state, the amount purchased, the date of each purchase, the name of the person from whom purchased, the manifest, bill of lading or delivery invoice number of each shipment, which number shall be the number used by the original supplier as shown on the basic shipping records which accompany the shipment, the date of receipt of such shipment of motor fuel, diesel fuel or blending material, the point of origin, point of destination of each shipment, the quantity of each of said purchases or shipments, the tank car number and initials of the car, if shipped by rail, or the name or the O.T.C. license number of the transporter if shipped by truck. The

report must also include the number of gallons of motor fuel, diesel fuel or blending material sold or withdrawn from storage for sale or use in this state during the preceding month, the date of each such sale, or use or withdrawal for the sale, the quantity of each sale, or amount used, the name and address of each purchaser, the manifest, bill of lading, or delivery invoice number, which number shall be the number as shown on the basic shipping or delivery records which accompany the delivery, the tank car initial and number of the car in which same was shipped, if transported by rail, or the name or the O.T.C. license number of the transporter, if shipped by truck. Provided that, if it is determined by the Tax Commission that a detailed record including delivery invoice of each and every sale of motor fuel, diesel fuel or blending material is being kept in accordance with the provisions of this article, the Tax Commission may require in lieu of the detailed schedule of sales, a report of the total gallons of motor fuel, diesel fuel or blending material sold or used by each bulk station, together with a detailed listing of all sales on which exemption is claimed showing the date, seller's invoice number, exemption invoice number, name and address and exemption permit number of the purchaser and number of gallons of each sale. Provided, however, that all persons engaged in producing, refining, preparing, distilling, blending, manufacturing, or compounding motor fuel, diesel fuel or blending material, **[must]** SHALL include the required detailed schedule of withdrawals from storage for sale or use in the monthly reports covering such producing, refining, preparing, distilling, blending, manufacturing, or compounding operations. The report must

also include the amount of motor fuel, diesel fuel or blending material on hand at the beginning and close of the month as shown by the physical inventory taken on those dates, and such other information pertaining to such production, receipts, sales, or use of motor fuel, diesel fuel or blending material ordered as the Tax Commission may require. In order to compute the net gallonage of diesel fuel taxable under this act, there shall be allowed a deduction from the total number of gallons of diesel fuel sold the amount of diesel fuel used exclusively for purposes other than to propel motor vehicles over the public highways of this state. In the event it would be either more practicable or more accurate to determine the amount of diesel fuel so used on a mileage, idling time or other basis, the Tax Commission is authorized to approve and accept such basis.

C. Every distributor, at the time of making the monthly reports required by this section, shall remit to the Tax Commission the amount of tax due.

It shall be unlawful for any distributor, retailer or dealer to sell or offer for sale in this state, motor fuel or diesel fuel while delinquent in the payment of any excise tax due the state.

Motor fuel taxes remitted by a distributor **[on behalf of a licensed retailer of the distributor or collected]** on behalf of a nonlicensed purchaser of motor fuel that are subsequently determined to be uncollectible by the distributor may be credited against subsequent motor fuel tax liability imposed by law upon such distributor. For purposes of this subsection, motor fuel taxes **[collected on behalf of a licensed retailer of the distributor or**

collected] REMITTED on behalf of a nonlicensed purchaser shall be deemed uncollectible if such taxes are deducted for purposes of calculating the federal income tax liability of the distributor. The method for crediting uncollectible motor fuel taxes as provided by this subsection shall be prescribed in rules and regulations of the Oklahoma Tax Commission.

D. Reports and remittances as required herein, which are received by the Tax Commission subsequent to the twenty-fifth of the month but which were mailed on or before the twenty-fifth of the month in which payable, shall be deemed to have been received by the Tax Commission before becoming delinquent. Postmark or registry receipt showing deposit in the U.S. mails shall be conclusive evidence of the date of mailing.

The time for filing returns and paying the tax levied by this article shall not be extended.

E. Any retailer or dealer as defined in Section 501 of this title shall, at its option, pay to the distributor, for the benefit of the state, all taxes due on all diesel fuel purchased from distributors or may procure a distributor's license as provided in Section 510 of this title and be subject to the reporting requirements of this section.

F. When any person shall fail to submit or remit to the Tax Commission any reports or taxes required hereunder for the tax levied in Sections 502.1 and 522.1 of this title within twenty-five (25) days from the date they are due, the Tax Commission may assess the following additional penalties:

A penalty of ten percent (10%) of the total tax due may be assessed on the thirtieth day from the day the taxes or reports are due.

Should the taxes or reports required hereunder not be submitted or remitted after the thirtieth day from the day they are due, action may be initiated to cancel such person's license under the provisions of Section 212 of this title.

SECTION 10. AMENDATORY 68 O.S. 1991, Section 516, is amended to read as follows:

Section 516 **[(a)]** A. An excise tax of one and one-half cents ($0.015) per gallon is levied upon the sale of each and every gallon of gasoline sold, or stored and distributed, or withdrawn from storage, for sale or use which tax shall be in addition to the tax of four cents ($0.04) per gallon levied by Section 502 of this **[Code]** TITLE, and which tax shall be in addition to all other taxes **[herein or hereafter]** levied upon gasoline**[; provided, that ninety-seven]**. NINETY-SEVEN and one-half percent (97 1/2%) of the net gallonage reported for taxation, after all deductions allowed by law have been made, shall be the basis used in the computation of the amount of tax due**[; and provided, further, that gasoline]**. IT IS THE PURPOSE AND INTENT OF THIS SECTION THAT THE TAX LEVIED ON GASOLINE PURSUANT TO THE PROVISIONS OF THIS ARTICLE SHALL BE A LEVY AND ASSESSMENT ON THE CONSUMER AND THE LEVY AND ASSESSMENT ON OTHER PERSONS AS SPECIFIED IN THIS ARTICLE SHALL BE AS AGENTS OF THIS STATE FOR THE COLLECTION OF THE TAX. GASOLINE which is exempt from the tax of four cents

($0.04) per gallon under Section 509 of this **[Code]** TITLE shall also be exempt from one-half cent ($0.005) per gallon gasoline excise tax of the one and one-half cents ($0.015) per gallon tax levied by this section but shall not be exempt from the remaining one cent ($0.01) per gallon gasoline excise tax hereby levied. It is the intent of the Legislature that one-half cent ($0.005) per gallon of the one and one-half cents tax levied by this section shall not apply to gasoline when used for agricultural purposes as provided by Section 509 of this **[Code; and provided, further, that gasoline]** TITLE. GASOLINE which is exempted from the tax of four cents ($0.04) under Section 508 of this **[Code]** TITLE shall be exempted from the one and one-half cents ($0.015) per gallon tax levied by this section**[; and provided, further, that no]**. NO gasoline shall be the subject of the tax hereby levied more than once.

[(b)] B. The tax of one and one-half cents ($0.015) per gallon herein levied shall be reported to and collected by the Tax Commission in the same manner, by the same method and at the same time as the tax of four cents ($0.04) per gallon levied by Section 502 of this **[Code]** TITLE.

[(c)] C. The tax of one and one-half cents ($0.015) per gallon herein levied shall apply to and be payable on gasoline sold and delivered to or used by the state, city, town, county or any political subdivision thereof.

SECTION 11. AMENDATORY 68 O.S. 1991, Section 520, is amended to read as follows:

Section 520. There is hereby levied an excise tax of eight one-hundredths of one cent ($0.01) per gallon on all

gasoline, kerosene, naphtha, motor fuel, and blending material sold, or stored and distributed or withdrawn from storage for sale or use in **[the State of Oklahoma]** THIS STATE or delivered in **[the State of Oklahoma]** THIS STATE for resale to consumers of such products, which shall be in addition to all other taxes levied by this article. IT IS THE PURPOSE AND INTENT OF THIS SECTION THAT THE TAX LEVIED ON GASOLINE, KEROSENE, NAPHTHA, MOTOR FUEL, AND BLENDINGS MATERIAL PURSUANT TO THE PROVISIONS OF THIS ARTICLE SHALL BE A LEVY AND ASSESSMENT ON THE CONSUMER AND THE LEVY AND ASSESSMENT ON OTHER PERSONS AS SPECIFIED IN THIS ARTICLE SHALL BE AS AGENTS OF THIS STATE FOR THE COLLECTION OF THE TAX.

SECTION 12. AMENDATORY 68 O.S. 1991, Section 522, is amended to read as follows:

Section 522. **[(a)]** A. There is hereby levied an excise tax of one cent ($0.01) per gallon upon the sale of each and every gallon of gasoline sold, or stored and distributed, or withdrawn from storage, for sale or use, which tax shall be in addition to all other taxes levied by this article upon gasoline**[; provided, that ninety-seven]**. NINETY-SEVEN and one-half percent (97 1/2%) of the net gallonage reported for taxation, after all deductions allowed by law have been made, shall be the basis used in the computation of the amount of tax due**[, and provided, further, that no]**. NO gasoline shall be the subject of the tax hereby imposed more than once. IT IS THE PURPOSE AND INTENT OF THIS SECTION THAT THE TAX LEVIED ON GASOLINE PURSUANT TO THE PROVISIONS OF THIS ARTICLE SHALL BE A LEVY AND

ASSESSMENT ON THE CONSUMER AND THE LEVY AND ASSESSMENT ON OTHER PERSONS AS SPECIFIED IN THIS ARTICLE SHALL BE AS AGENTS OF THIS STATE FOR THE COLLECTION OF THE TAX.

[(b)] B. The excise tax of one cent ($0.01) per gallon levied by this section, including interest and penalties thereon, shall be reported to and collected by the Tax Commission at the same time, in the same manner, and by the same method as the tax imposed by Section 502 of this **[Code]** TITLE.

[(c)] C. On sales of gasoline by a licensed distributor of motor fuel, to any other licensed distributor, the tax levied by this section may be assumed by such other licensed distributor in the same manner and under the same conditions as provided elsewhere herein.

[(d)] D. The only exemptions from the tax hereby levied are as follows:

1. Gasoline or motor fuel used exclusively by the United States.

2. Gasoline or motor fuel exported from this state which is exempt under Section 507(b) of this **[Code]** TITLE.

3. Gasoline or motor fuel used exclusively in aircraft which is exempt under the provisions of Section 508 of this **[Code]** TITLE.

4. Gasoline or motor fuel purchased by a school district which is exempt under provisions of Section 527 of this **[Code]** TITLE.

SECTION 13. AMENDATORY 68 O.S. 1991, Section 522.1, is amended to read as follows:

Section 522.1 There is hereby levied an excise tax of one cent ($0.01) per gallon upon the sale of each and every gallon of diesel fuel sold within the state, to be reported and collected as provided by law**[; provided, that ninety-seven]**. NINETY-SEVEN and one-half percent (97 1/2%) of the net gallonage reported for taxation, after all deductions allowed by law have been made, shall be the basis used in the computation of the amount of tax due**[; provided, further, no]**. NO diesel fuel shall be the basis more than once of the tax imposed by this section. IT IS THE PURPOSE AND INTENT OF THIS SECTION THAT THE TAX LEVIED ON DIESEL FUEL PURSUANT TO THE PROVISIONS OF THIS ARTICLE SHALL BE A LEVY AND ASSESSMENT ON THE CONSUMER AND THE LEVY AND ASSESSMENT ON OTHER PERSONS AS SPECIFIED IN THIS ARTICLE SHALL BE AS AGENTS OF THIS STATE FOR THE COLLECTION OF THE TAX.

The tax shall be payable upon diesel fuel sold and delivered to the state.

SECTION 14. AMENDATORY 68 O.S. 1991, Section 527, as amended by Section 1, Chapter 300, O.S.L. 1992 (68 O.S. Supp. 1994, Section 527), is amended to read as follows:

Section 527. A. Gasoline, diesel fuel or special fuels used solely and exclusively in district-owned public school vehicles or FFA and 4-H Club trucks for the purpose of legally transporting public school children shall be exempt from all state taxes; and gasoline, diesel fuel or

special fuels purchased by any school district for use exclusively in school buses leased or hired for the purpose of legally transporting public school children, or in the operation of vehicles used in driver training, shall also be exempt from all state taxes.

B. Gasoline, diesel fuel or special fuels used solely and exclusively as fuel to propel motor vehicles on the public roads and highways of this state, when leased or owned and being operated for the sole benefit of a county, city, town, or a volunteer fire department with a state certification and rating, shall be exempt from all state taxes levied by this title. Provided, if the gasoline, diesel fuel or special fuels are placed directly into the fuel supply tank or tanks of the motor vehicles by the supplier, certification must be made on the invoice and all such sales must be reported by the supplier on forms provided by the Oklahoma Tax Commission.

C. SALES OF MOTOR FUEL AND DIESEL FUEL TO FEDERALLY RECOGNIZED INDIAN TRIBES FOR USE IN TRIBALLY OWNED VEHICLES USED EXCLUSIVELY FOR GOVERNMENTAL PURPOSES SHALL BE EXEMPT FROM THE TAXES LEVIED BY THIS ARTICLE. ALL FEDERALLY RECOGNIZED INDIAN TRIBES SHALL BE ISSUED A TAX EXEMPTION CERTIFICATE FROM THE OKLAHOMA TAX COMMISSION FOR THAT PORTION AUTHORIZED BY THIS SECTION TO BE TAX EXEMPT.

SECTION 15. It being immediately necessary for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason whereof

this act shall take effect and be in full force from and after its passage and approval.

COMMITTEE REPORT BY: COMMITTEE ON REVENUE AND TAXATION, dated 2-22-95 - DO PASS, As Coauthored.

REPLY

BRIEF

Supreme Court, U.S.
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OCTOBER TERM, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONER

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OKLAHOMA TAX COMMISSION,

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REPLY BRIEF OF PETITIONER

Remarkably, the Tribe (despite the vituperative tone of its argument[1]) and the United States take issue with *none* of the principle propositions advanced in our opening brief. So far as the tax on motor fuel is concerned, they do not deny that the balance of state and tribal interests decisively favors the State; they expressly recognize that their theory rests on a formalism that has no basis in economic reality; and they acknowledge that the Court has *disavowed* the rationale of its early decisions according tribes absolute immunity from state taxation. As for the income tax,

[1] The Tribe demonstrates a useful facility with derogatory turns of phrase, variously labeling our arguments "incomprehensibl[e]" (Resp. Br. 13 n.13), "egregious" (*id.* at 14), "appeal by ambush" (*ibid.*), "fatuous" (*id.* at 16), "literally incredible" ((*id.* at 18), "a material factual misrepresentation" (*ibid.*), "bizarre" (*id.* at 19 n.17), "absurd" (*id.* at 26 n.22), "incoheren[t]" (*id.* at 34), and "lacking credibility of the most fundamental kind" (*id.* at 13).

neither the Tribe nor the United States denies that Congress has fundamentally changed the understandings that underlay the Treaty of Dancing Rabbit Creek; to avoid that reality, they offer mutually — and internally — inconsistent readings of the Treaty. They accordingly have offered no persuasive defense of the decision below.

Before joining issue on the merits, we note that Okla. House Bill No. 1522, the proposed amendment to the motor fuel tax described by the Tribe (at Br. 11-12), died in a committee of the Oklahoma Senate. Legislative rules preclude its further consideration during the current session of the Oklahoma Legislature. There accordingly is no substantial prospect that the tax will be amended (and the motor fuel issue mooted) during the pendency of this case.

A. The Motor Fuel Tax Is Authorized By The Hayden-Cartwright Act

1. The Tribe and the United States are wrong in contending (at Resp. Br. 15-18, U.S. Br. 20-21) that the Commission is precluded from relying on the Hayden-Cartwright Act in this Court because it did not advance that Act below or in its petition for certiorari. The Commission's reliance on the Act is "not a new claim * * *, but a new argument to support what has been [its] consistent claim" (*Lebron* v. *National Railroad Passenger Corp.*, No. 93-1525 (Feb. 21, 1995), slip op. 4): that the motor fuel tax is not preempted by federal law. Use of the Act to establish that proposition "is fairly embraced within the question set forth in the petition for certiorari." *Id.* at 5 (citation omitted). Insofar as is relevant here, the first question presented in the petition is "[w]hether principles of federal preemption * * * preclude a State from imposing a tax on sales of motor fuel by an Indian tribe" (Pet. i); far from presenting a distinct issue, the Hayden-Cartwright Act is additional *authority* that helps to answer that question by establishing that federal law does *not* preempt the motor fuel tax. See *Yee* v. *Escondido*, 112 S. Ct. 1522, 1532 (1992); *United States National Bank of Oregon* v. *Independent Insurance Agents*, 113 S.

Ct. 2173, 2178 (1993).[2] We therefore are frankly mystified by the Tribe's contention (at Br. 15) that a federal statute authorizing state legislation that is "*otherwise forbidden* by federal law" has nothing to do with an inquiry into whether that legislation is preempted by federal law.[3]

2. On the merits, the United States (at Br. 21) and the Tribe's other *amici* contend principally that the Act is inapplicable here because it does not in terms authorize state taxation of sales on *Indian* reservations. This assertion is insupportable. Although we certainly agree that statutory ambiguities should be resolved in the Tribe's favor, that principle is simply beside the point where, as here, the statute is wholly *un*ambiguous.

The Hayden-Cartwright Act provides that States may tax sales of motor fuel that occur "on United States military or other

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[2] Engaging in the sort of ad hominem attack that typifies its brief, the Tribe (at Br. 16-18) dismisses as "fatuous" the Commission's explanation (at opening Br. 24 n.11) for its failure to cite the Hayden-Cartwright Act in the courts below. While we believe it inappropriate to respond in kind, we note that the Commission's thinking below is, for present purposes, beside the point; the relevant issue is whether the applicability of the Hayden-Cartwright Act is subsumed within the question presented in the petition. On that, the Tribe's wholly conclusory discussion is, in the Tribe's word (at Br. 19 n.17), "bizarre."

[3] Indeed, as the Court explained in closely analogous circumstances in *Lebron* (at slip op. 7), it is here "quite impossible" to resolve the question of preemption without considering the meaning of the Act. As we note in our opening brief (at 22-23), preemption analysis in the Indian setting requires review of the background of relevant congressional enactments. In these circumstances, "refusing to regard [the Hayden-Cartwright Act's applicability] as embraced within the petition" — and therefore treating the statute as though it did not exist — "may force [the Court] to assume what the facts will show to be ridiculous, a risk which ought to be avoided." *Ibid.* Compare *Yee*, 112 S. Ct. at 1533 (new argument not addressed where it "would not assist in resolving" the question presented in the petition).

reservations."[4] Despite the Herculean efforts of the United States and the Tribe's other *amici* to find ambiguity here, there was no doubt about the meaning of the term "reservation" at the time of the Act's enactment in 1936; it had long been understood that "[t]he word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, or an Indian reservation, or, indeed, one for any purpose for which Congress has authority to provide." *Celestine*, 215 U.S. at 285. As we explain in our opening brief (at 23), the Attorney General made precisely that point just four months after the statute's enactment. Moreover, as *amici* South Dakota, *et al.*, explain (at Br. 11, 15-17), Senator Hayden previously had proposed legislation in which the term "reservations under federal control" was specifically intended to apply to Indian reservations, and there is no reason to doubt that he had the same meaning in mind when he authored the similarly-worded Hayden-Cartwright Act. Moreover, the Act's reference to licensed traders — which, the United States evidently agrees (see U.S. Br. 23 n.14), can refer only to *Indian* traders — would have been nonsensical had the Act not applied to sales taking place on Indian reservations.

This understanding is confirmed by the Act's background and purposes. As *Amici* South Dakota, *et al.*, explain in some detail (at Br. 12-23), the Act was needed because the sale of fuel on federal reservations was leading to a substantial loss of state tax revenue — which, as this case demonstrates, is just the effect of sales by tribes on Indian reservations. And there is every reason to believe that this was a problem at the time of the statute's enactment; the on-reservation sale of fuel to the general public was the very situation addressed in 1940 by Solicitor of the Interior Margold in *Menominee Indian Mills*, 57 Interior Dec. at 138-140. Indeed, the Act was enacted as an amendment to a bill that provided funding for highways through a variety of federal reservations, including

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[4] As *amici* South Dakota, *et al.*, explain (at Br. 21), the express mention of military reservations evidently was prompted by this Court's then-recent decision in *Standard Oil Co.* v. *California*, 291 U.S. 242 (1934), that a state fuel tax could not be imposed on the sale of gasoline at the Presidio military reservation in San Francisco.

national forests, national parks, and Indian reservations. See §§ 2-6, 49 Stat. 1520-1521. The United States offers no basis for concluding that the Act was not meant to apply to each.[5]

It was for these reasons, as the United States itself acknowledges in a revealingly defensive footnote (at Br. 23 n.14), that Solicitor Margold concluded in 1940 that the Act applies to sales on Indian reservations. As we note in our opening brief (at 24), Congress twice revisited and once re-enacted the Act in the years after Solicitor Margold issued his opinion. That is dispositive here. See *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978); see also *Qualitex Co.* v. *Jacobson Products Co., Inc.*, No. 93-1577 (March 28, 1995), slip op. 14.[6]

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[5] The United States finds it significant that, although the Act does not mention Indian reservations in terms, other provisions of the highway funding statute to which the Act was an amendment "specifically refer[] * * * to 'Indian reservation[s]' and 'Indian lands.'" U.S. Br. 21-22, quoting §§ 6, 3, 49 Stat. 1521, 1520. Read in context, however, the funding statute *confirms* that the Act applies to Indian reservations, as Solicitor Margold concluded. See Pet. Br. 24 n.11. As we note in text, separate sections of the funding statute appropriated moneys for the construction of highways on different sorts of federal reservations; Section 6 dealt with Indian reservations, and Congress therefore had no choice but to "specifically refer[]" to such reservations in that provision. The statute made similar "specific references" in Section 2 to national forests and in Section 4 to national parks — but that hardly means that those forms of federal reservation are excluded from the scope of the Act because they are not separately enumerated in it. Section 3's reference to "nontaxable Indian lands," also cited by the United States, refers to allotted lands which, as distinct from reservation lands, had to be separately listed.

[6] The Tribe's *amici* Cheyenne-Arapaho Tribes, *et al.* (at Br. 13-18), and Navajo Nation Oil and Gas Co. (at Br. 20-26), assert that the Buck Act, 4 U.S.C. §§ 105-113, is useful in establishing the scope of the Hayden-Cartwright Act. But the Buck Act, which in 4 U.S.C. §§ 105 and 106 authorizes state sales and income taxes on federal reservations, provides powerful support for *our* position. In sharp contrast to the Hayden-Cartwright Act, the Buck Act explicitly provides that "[n]othing in sections 105 and 106 of this title shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed." 4

B. The Court Should Not Apply A Per Se Rule Of Tax Immunity To Preclude Collection Of The Motor Fuel Tax

1. The Tribe's and the United States' defense of what they describe as the per se rule against state taxation of Indian tribes is notable for what it reveals to be the common ground between the parties: they do not take issue *in any respect* with our description either of the motor fuel tax or of the competing state and tribal interests at stake here. They accordingly do not deny that the fuel subject to tax is used almost exclusively outside of Indian country on state jurisdiction roads; that the fuel is imported onto federal trust lands so that it may be immediately resold for use *outside* of Indian country; or that the purchasers of that fuel are for the most part non-members of the Tribe.[7] They also pointedly do not deny

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U.S.C. § 109. Congress preserved this distinction when the two statutes were codified and re-enacted in 1947, making the Hayden-Cartwright Act applicable to all sales on federal reservations and the Buck Act inapplicable to Indians "not otherwise taxed." (This distinction makes perfect sense: motor fuel purchased on a reservation often, as in this case, will be used on state jurisdiction roads, while a State typically will not have an interest in taxing income earned by reservation residents or the sale of goods that will be consumed on the reservation.) Congress's use of this differing language in two closely related provisions should be given effect. While the Tribe's *amici* look for support to nuances of the Buck Act's legislative history, the decisive point is that Congress chose to modify the Buck Act language to create an Indian tax immunity while leaving the Hayden-Cartwright Act unchanged.

[7] While not taking issue with the district court's finding that the fuel subject to tax is "used almost exclusively off of Indian country on State jurisdiction roads" (Pet. App. 36a), the Tribe points (at Br. 37 n.33) to a contract it has entered into with the Bureau of Indian Affairs for what the Tribe describes as "*its own* road and bridge construction and maintenance projects." But this extra-record material does not indicate whether these roads are in Indian country, does not show their mileage, indicates that such roads are funded by the BIA rather than the Chickasaw nation, and provides that "[a] prerequisite for approval by [the] Federal Highway Administration for all construction projects will be a maintenance agreement with a local entity where-in *the Chickasaw Nation shall be*

that the Tribe's sale of fuel has substantial effects and imposes significant costs upon the State *outside* of Indian country, while it imposes no burdens at all upon the Tribe *within* Indian country.[8]

Similarly, the Tribe and the United States expressly acknowledge (see Resp. Br. 10-11; U.S. Br. 15 & n.6) that their per se rule rests *entirely* upon a formalism. They thus recognize that, at least so far as sales to non-members are concerned, the State could impose a tax *identical* to the one challenged here if only it declared the levy's legal incidence to fall upon the consumer, a change that would have *no effect at all* on the actual operation of the tax. What is more, they also concede (the United States forthrightly (at Br. 15 n.6), and the Tribe more grudgingly (at Br. 20)) that the Court has *rejected* their approach — which would substitute an especially wooden formalism for "economic realities" (*Complete Auto*, 430 U.S. at 279) — in virtually every other context. See, *e.g.*, *Oklahoma Tax Commission* v. *Jefferson Lines, Inc.*, No. 93-1677 (April 3, 1995), slip op. 7-8. Against this background, the question here reduces to the following: whether, in a case where the State's interest in imposing a tax is compelling and the Tribe's interest in resisting it is insubstantial, the Court nevertheless should apply a uniquely formalistic rule to accord the Tribe a tax immunity.

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agreement with a local entity where-in *the Chickasaw Nation shall be unconditionally excluded as ever being responsible for maintenance.*" Contract No. CT G03 T 906 11, Art. II, ¶ 202.13 (emphasis added). The Court accordingly should decide this case on the basis of the record created below, which establishes unequivocally that the Chickasaw Nation does not construct or maintain roads for the use of the general public and that the fuel subject to tax is used almost exclusively on state roads. Pet. App. 36a-37a. On a related point, the Tribe does concede (at Br. 12 n.12) that sales to tribal members are only a "small component" of total sales.

[8] Indeed, the United States candidly acknowledges that "[t]he basis for state taxation is strongest when Indians 'impor[t] a product onto the reservations for immediate resale to non-Indians,' and thus are merely marketing an exemption from state tax." U.S. Br. 9 n.2 (citation omitted). Neither the United States nor the Tribe denies that the Tribe is doing precisely that in this case.

2. The issue here is further narrowed by the grounds on which the Tribe and the United States defend their per se rule. They acknowledge, as we explain in our opening brief (at 20-21), that the Court expressly has *disavowed* the rationale that underlay its early holdings according Indian tribes absolute immunity from state taxation. See Resp. Br. 35-36; U.S. Br. 13. They further recognize that the Court resolves Indian preemption claims in all other settings by conducting "'a particularized examination of the relevant state, federal, and tribal interests.'" *Cotton Petroleum*, 490 U.S. at 176 (citation omitted). See Resp. Br. 35; U.S. Br. 7-8, 13. And they make *no* attempt to respond to the demonstration in our opening brief (at 22-23) that congressional policy does not require the absolute prohibition of state taxes falling on Indians. In this setting, it is no surprise that the justifications for the per se rule of tax immunity that the Tribe and the United States have managed to concoct are strikingly feeble.

First, the Tribe and the United States are wrong when they insist that, apart from its rationale, precedent establishes a settled rule of absolute Indian immunity from state taxation in cases such as this one. Resp. Br. 32-35; U.S. Br. 8-9, 13-14. We recognize, of course, that several of this Court's decisions refer to a "per se" or "categorical" bar to state taxation of Indian tribes. *County of Yakima* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 256 (1992); *California* v. *Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). But as we explain in our opening brief (at 19-20), and as the Tribe elliptically acknowledges (at Br. 33), the Court more often has carefully measured its language by indicating that state taxes "generally" are inapplicable to the on-reservation activities of Indian tribes or that there is a "presumption" against the validity of such taxes.[9]

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[9] Citing *Sac and Fox*, 113 S. Ct. at 1989, 1990, 1993, the United States (at Br. 14 n.5) contends that this presumption may be overcome only by an express congressional authorization of state taxation. But on two of the cited pages the Court said nothing at all about congressional action. And on the third, the Court stated that "[a]bsent express congressional direction to the contrary, we *presume against* a State's having the jurisdiction to tax within Indian country." 113 S. Ct. at 1993 (emphasis added). The Court did *not* say, as the United States would have

Moreover, as we also explain (at Br. 25), the Court *expressly* has stated that its holdings invalidating state taxes did *not* address claims — like the one made by the Tribe in this case — "that the State could not tax that portion of [tribal] receipts attributable to on-reservation sales to non-Indians." *Moe*, 425 U.S. at 482. The United States and the Tribe make no response to this point.[10]

Perhaps most important, we explain in our opening brief (at 25) that the Court *never* has invalidated a state tax in circumstances even remotely like the ones here, where the tax falls upon the sale of goods that are imported into Indian country for immediate resale to persons (in large measure non-Indians) who will use those goods outside of Indian country, in the process imposing substantial burdens upon the State. Once again, the United States and the Tribe make no response to this point — and certainly do not purport to cite any such decision. It therefore should be clear that we are not asking the Court to depart from any of its prior holdings; to the contrary, we urge the Court to apply principles that it has stated repeatedly.

Second, the United States contends that allowing States to tax Indians is inconsistent with "the Constitution's grant of authority to Congress to regulate commerce 'with the Indian Tribes.'" U.S. Br. 13.[11] But in this respect the power to tax does not differ from

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it, that absent congressional authorization state taxes are wholly precluded.

[10] The Tribe does contend (at Br. 36) that the Court affirmed the per se rule in *McClanahan* notwithstanding the demise of the federal instrumentality doctrine as a basis for Indian tax immunity. But as we explain in our opening brief (at 20), *McClanahan* turned on particular treaty language, and in any event stated a rule that applies only to taxes on reservation land or income (see *Mescalero Apache* v. *Jones*, 411 U.S. at 148) — the sorts of taxes that plainly are invalid under a test that balances state and tribal interests. See Pet. Br. 18-19.

[11] The United States also maintains (at Br. 13) that "the power to tax members of a political community is a core hallmark of sovereign authority." But the Oklahoma tax does not preclude the Tribe from exercising its sovereign authority by imposing tribal taxes on its members; Oklahoma seeks only to exercise *the State's* sovereign authority by taxing

the power to regulate (indeed, the Commerce Clause is more directly concerned with regulation than with taxation) — and the United States concedes that States are *not* absolutely precluded from regulating the on-reservation activities of Indian tribes. The United States' lengthy constitutional history (at U.S. Br. 10-13) therefore is entirely beside the point.

Third, citing Chief Justice Marshall's observation that "'the power to tax involves the power to destroy,'" the United States suggests that "a State's power to tax could be abused to disrupt the Indian sovereign's ability to govern itself." U.S. Br. 14, quoting *County of Yakima*, 502 U.S. at 258, in turn quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). Again, however, this does not distinguish the State's power to regulate, which also involves the power to destroy — and, indeed, does so more directly. In any event, the danger posed by the United States is entirely chimerical. Under the ordinary rules that apply in Indian cases, a state statute will be preempted when it infringes "'on the right of reservation Indians to make their own laws and be ruled by them.'" *McClanahan*, 411 U.S. at 172 (citation omitted). Under this test, we have little doubt, as we noted in our opening brief (at 18-19), that state taxes on reservation income, lands, personal property, or other "value generated on the reservation by activities involving the Tribes" (*Colville*, 447 U.S. at 156-157) generally will be held invalid. As a consequence, the United States' per se rule by definition is necessary *only* in cases like this one, where the state tax manifestly poses *no* threat to Indian sovereignty.

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an enterprise that imposes substantial burdens upon the State. The United States' further invocation of the exclusion of "Indians not taxed" (see *id.* at 14, citing Art. I, § 2, cl. 3, and Amend. XIV, § 2) from the enumeration upon which the apportionment of Representatives and direct taxes was based is rather puzzling as a ground for Indian tax immunity; after all, Indians are now citizens of the United States and of the States in which they live (see P. Strickland ed., *Felix Cohen's Handbook of Federal Indian Law* 647 (1982 ed.)) and "there are no longer any Indians who can properly be considered 'Indians not taxed' within the meaning of the constitutional exception." *Id.* at 389. All Indians are, of course, now taken into account in the federal apportionment process. See *id.* at 389 n.11.

Finally, the United States and the Tribe contend that their per se rule would limit litigation by "set[ting] a clear standard on which both States and Tribes can rely." U.S. Br. 16; see Resp. Br. 37-38. But even in the doubtful event that this wholly utilitarian consideration could justify invalidation of an otherwise permissible state law,[12] it would not do so here. As we explain in our opening brief (at 30-31), and as this case illustrates, the proposed per se rule would simply change the focus of state-tax disputes, encouraging litigation about where the legal incidence of various state taxes falls — an issue of state law that is likely to give the federal courts considerable difficulty. We also explain (at Br. 30), as do our *amici* PMAA, *et al.* (at Br. 10-11), that the formalistic approach of the Tribe and the United States surely will lead to manipulation as tribes chase the legal incidence (and therefore the tax immunity) up and down the distribution chain. The Tribe and the United States have nothing to say in response to these points.[13]

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[12] In a closely analogous setting, the Court rejected the argument that it should adopt "a rule of absolute immunity" from state taxation on the theory that such a rule "would relieve th[e] Court of difficult judgments that on occasion would have to be made." *Complete Auto*, 430 U.S. at 289 n.15. The Court explained "that administrative convenience * * * is insufficient justification for abandoning" the otherwise controlling principle (*ibid.*) — which in this case is that state laws should be set aside only when they have the actual effect of infringing tribal sovereignty.

[13] The United States' suggestion (at Br. 16) that *County of Yakima*, 502 U.S. at 267, catalogues the sorts of burdens that might follow departure from a per se rule of Indian tax immunity is highly misleading. The Court there rejected the contention that a tribe is *protected* from a congressionally authorized state tax by its inherent sovereign powers, a proposed approach that would have required a particularized inquiry into the tribe's interests at any given moment as to each individual parcel of land subject to tax. See *id.* at 266-268. But it is one thing to say that a balance of state and tribal interests is unnecessary to resolve the question of preemption when (as in *County of Yakima*) Congress has clearly permitted a tax (see *id.* at 267); it is quite another when Congress has not spoken directly to the issue at all. In any event, balancing the competing interests in this case would not require anything like the particularized inquiry proposed in *County of Yakima*. To the contrary, the Court engages in just such an accommodation of competing interests when the

3. The United States (at Br. 15) and the Tribe (at Br. 11, 38) maintain that, because the State permissibly may impose an essentially identical tax in the future (at least on sales to non-members) simply by changing the levy's legal incidence, there is no need to uphold the tax that the State actually did enact. But as we explain above, this argument draws precisely the wrong conclusion from its premise: it confirms that the United States and the Tribe would invalidate the tax not because of any impact it has on economic reality, but instead because the State invoked the wrong formalism in the drafting process. This approach, which would require the State to jump through an otherwise meaningless semantic hoop to preserve its tax, "stands only as a trap for the unwary draftsman." *Complete Auto*, 430 U.S. at 279. The United States and the Tribe offer no explanation for why this dinosaur of a rule, having become deservedly extinct elsewhere in the law (where economic realities are "decisive" (U.S. Br. 15 n.6)), should survive here.

Nor, it should be added, does the State's ability to resurrect the tax by conforming to the Tribe's semantic requirements make this a case of "no harm, no foul." We explain in our opening brief (at 30-31) that the possibility of changing the legal incidence of a tax that has been declared invalid is not a satisfactory solution to the problem posed by the Tribe's per se rule; Indian sovereign immunity will prevent recovery by the State of tax revenue forgone during the period prior to legislative action — a period that often

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legal incidence of the tax falls on a non-member of the tribe — an accommodation that in the *Moe-Colville* line of cases favored the State. Moreover, we think it plain that decisions of this Court already establish that particular categories of state taxes — such as the tax on the reservation income of member reservation residents at issue in *McClanahan* — are precluded in virtually all circumstances. As for the suggestion by the Tribe (at Br. 37-38) and the United States (at Br. 16) that *amici* South Dakota, *et al.*, endorse a per se rule of tax immunity, the language they cite appears in the statement of interest section of *amici*'s brief; the argument section of that brief (at 7) states only — and somewhat inconsistently — that "[i]t is often argued that the Court has adopted a per se rule regarding the imposition of state taxes in Indian country." *Amici* offer no defense of the per se rule.

will be lengthy because state legislatures typically do not sit in continuous session. The United States offers no response to this point; the Tribe reluctantly *acknowledges* it to be valid. Resp. Br. 39 n.34.

4. The Tribe (at Br. 40-41) and the United States (at Br. 15 n.7, 24 n.15) contend that taxation of sales to tribal members is impermissible even if the legal incidence of the tax falls on the consumer. But they nowhere explain why this should be so. They do not deny that use of fuel by members of the Tribe outside of Indian country imposes substantial burdens on the State, and they do not contend that imposition of a tax on the sale of such fuel would infringe in any respect on tribal sovereignty. They also acknowledge the Court's suggestion in a related setting (in *Sac and Fox* and *Colville*) that a state automobile registration fee or excise tax would be permissible if it were apportioned to use of the vehicle off of Indian country. Their only complaint is that the tax here is invalid because it is not apportioned. But that argument misses the mark: apportionment is not necessary here because, as the district court found, the fuel subject to tax is "used almost exclusively off of Indian Country on State jurisdiction roads." Pet. App. 36a. Moreover, if we are correct in our view that the Hayden-Cartwright Act applies to sales of fuel on Indian reservations, the Act plainly reaches sales to tribal members; neither the Tribe nor its *amici* contend otherwise.

C. The Incidence of Oklahoma's Fuel Tax Falls on the Consumer

There are only two provisions of the Oklahoma motor fuel tax code that bear directly on whether the *consumer rather than the retailer* shoulders the legal incidence of the motor fuel tax, and both make clear that the consumer does.[14] As we explain in our

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[14] The Tribe (at Br. 13) and the United States (at Br. 16) are wrong in contending that the Commission argued below that the legal incidence of the *fuel* tax falls upon the distributor. The Commission certainly did inform the court of appeals — as the statute expressly provides — that "motor fuel distributors are required to report and remit the tax on fuel sold to retailers." CA Br. 10. But the Commission immediately went on to add that "[t]he retailer's wholesale price will include the motor fuel

opening brief (at 35-36), a definitional provision of Oklahoma law refers to the collection of taxes by a distributor or *retailer*, indicating that both collect the tax from someone further down the distribution chain. Okla. Stat., Tit. 68, § 501C (emphasis added). And another provision declares that consumers using fuel for agricultural purposes may purchase it "without paying the tax," again establishing that it is the consumer who ordinarily is expected to pay. Okla. Stat., Tit. 68, § 509A.

The Tribe and the United States acknowledge that these provisions "imply that the consumer will bear the fuel tax." U.S. Br. 20 n.12. Yet the Tribe's only response to this point is the extraordinary contention that the Court should dismiss the explicit statutory language as "colloquialisms" that do not accurately state the meaning of the levy. Resp. Br. 29. Rather than make any effort to harmonize the statute's provisions (as does our approach), the Tribe invites the Court to ignore the provisions that do not comport with its proffered interpretation. We take the Tribe's remarkable argument as an implicit concession that the holding below cannot be squared with the plain terms of the statute.[15]

In support of their interpretation, the United States and the Tribe rely principally on two contentions: first, that "the code requires the retailer to pay to the distributor all taxes due" (U.S. Br. 17-18; see Resp. Br. 23)); and second, that distributors receive

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taxes which are in turn included in the retail price at the pump." *Ibid.* The Commission *never* suggested that the distributor bears the legal incidence of the fuel tax.

[15] The Tribe seeks to minimize the force of our argument by suggesting that we "[t]ear two clauses from the twenty-two page legislative scheme." Resp. Br. 27. But far from relying on the needle in the haystack, our interpretation invokes provisions appearing in the *definitional* section of the statute. Moreover, as we explain below, we also find support in exemptions that pervade the statutory scheme, reappearing in virtually every section that is relevant to the question at hand. It may be added that much of the "twenty-two page legislative scheme" mentioned by the Tribe addresses matters, such as the administration and distribution of tax funds (*e.g.*, §§ 504, 504.1, 518, 519, 523, 523.1, 525, 526, 531), that have nothing whatever to do with the issues in this case.

credits for tax payments that are uncollectible from retailers, while retailers do not receive credits for payments that are uncollectible from consumers. U.S. Br. 17-18; see Resp. Br. 24. On examination, these arguments are insubstantial. The first is simply wrong because there is *no* statutory requirement that retailers pay the tax on sales of gasoline.[16] The second, meanwhile, does no more than reflect recognition of the market reality that distributors,

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[16] Okla. Stat., Tit. 68, § 505E, the provision cited by the United States and the Tribe, gives retailers the option to "pay to the distributor * * * all taxes due on all diesel fuel purchased from distributors or [to] procure a distributor's license"; that provision is expressly limited to *diesel* fuel and therefore cannot by any stretch of the imagination impose a payment obligation for sales of gasoline. As for sales of diesel fuel, Section 505E, like the other provisions discussed in text, fairly may be interpreted as directing the retailer either to pass on to the distributor the tax it collects from ultimate purchasers, or to seek a distributor's license and thereby assume responsibility for remitting that tax directly to the state. Claiming that the tax otherwise would be unenforceable and pointing to the Commission's general authority to enforce the tax code, the Tribe (at Br. 24 n.20) and the United States (at Br. 19 n. 10) also contend that the State must be able to take legal action against retailers who fail to pay. But this argument is tautological. The question here is not whether the Tax Commission has authority to collect taxes from entities legally required to pay; it is whether the substantive portions of the fuel tax code impose a legal duty on the retailer in the first place. And it is clear (unambiguously so insofar as the tax on gasoline is concerned) that the law imposes no such payment obligation. In fact, we are unaware of any case in which the Commission has asserted a legal right to collect motor fuel taxes from a retailer. (The practicalities make clear why this does not create an enforcement problem. The tax is collected by the distributor as part of the total price charged the retailer; in practice, the retailer fails to pay only if it becomes insolvent.)

but not retailers, sell on credit.[17] This says nothing at all about the legal incidence of the tax vis-a-vis the consumer.

Our understanding is confirmed, as we explain in our opening brief (at 36-37), by the tax exemptions that pervade the statutory scheme and relieve *consumers* of the obligation to pay the tax when they meet certain statutory requirements. See Okla. Stat., Tit. 68, §§ 501B, 502.2B, 502.3B, 502.4B, 502.5B, 502.6B, 502.7B, 522(d). The Tribe's citation (at Br. 30-31) to statutes of other States that grant exemptions to consumers while declaring the tax's legal incidence to fall on the distributor reflects a misunderstanding of the inquiry here.[18] The question is not whether the inclusion of exemptions shifts a legislatively declared legal incidence; instead, it is whether, *in the absence of an express legislative statement declaring the tax to fall on the distributor or retailer*, a pervasive system of consumer-driven exemptions indicates that the tax falls on the consumer. Logic suggests that it does.[19]

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[17] Retailers typically remit the purchase price of fuel (including the tax due) to the distributor on a monthly basis. If the retailer becomes insolvent after receipt and sale of the fuel, but before it remits payment to the distributor, the tax will be uncollectible so far as the distributor is concerned. In contrast, retailers customarily receive payment at the time of sale.

[18] The Tribe also points to the absence of provisions in the motor fuel tax code similar to the provisions taxing the use, gift, possession, or consumption of cigarettes and placing a payment obligation on persons possessing untaxed cigarettes. But in contrast to cigarette stamp taxes, there is an obvious enforceability problem in determining whether a particular gallon of gasoline in an automobile's fuel tank has been taxed. Cf. *Milhelm Attea*, 114 S. Ct. at 2031.

[19] It is for this reason that the Tribe's reliance on *Gurley* v. *Rhoden*, 421 U.S. 200 (1975), is misplaced. In that case, the Court held that a statutory statement explicitly imposing the legal incidence of the fuel tax on the producer was not undermined by provisions authorizing particular consumers to seek refunds from the federal government for that portion of the fuel tax passed on by the producer. In contrast to the federal scheme, Oklahoma's statute neither explicitly provides that retailers must bear the legal incidence of the tax, nor requires consumers to seek

Finally, aside from its bald assertion (at Resp. Br. 25) that retailers must pay the tax, the Tribe makes no response to our argument that, if the legal incidence does not fall on the consumer, it must belong to the distributor. Just as the retailer is not obligated to pass the tax on to the consumer, so the distributor is not obligated to pass it on to the retailer; neither the consumer nor (as we explain above) the retailer has any legal obligation to pay. The Court therefore should in all events find that the legal incidence of the tax is not on the retailer.

D. Oklahoma May Impose Its Income Tax On Members Of The Tribe Who Live Outside Of Indian Country

In defense of the holding below regarding Oklahoma's income tax, the United States and the Tribe offer mutually — and internally — inconsistent interpretations of the treaty language providing that no "State shall ever have a right to pass laws for the government of the [Chickasaw] Nation." Disavowing the reading given the Treaty by the court of appeals, the Tribe insists (at Br. 45) that a state law is one "for the government" of the Chickasaw Nation if it "increases the cost (and consequently reduces the efficacy) of tribal government." That is the case here, the Tribe continues, because the tax "necessitat[es] the payment of wages higher than would be required absent state taxation thereof." *Ibid.*[20] But this approach, which has nothing to do with where the tribal employee lives or works (or, for that matter, with whether the employee is a member of the Tribe), has extraordinary implications. It would mean, for example, that a state law requiring automobiles to have functioning taillights could not be applied to tribal vehicles driven outside Indian country because fixing broken lights would "increase the cost of tribal government"; or it would mean that a tribal

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compensation for the passed-through tax through a system of refunds. Instead, it relieves exempt purchasers from the general burden, imposed on other consumers, of paying the tax in the first place.

[20] In contrast, the court of appeals found that "[s]ince the income tax is not a tax on the source of the income, it does not impose any burden on tribal government." Pet. App. 22a. Instead, the court invalidated the tax because it believed that the Treaty bars all state laws that fall upon individual members of the Chickasaw Nation. See *id.* at 30a.

employee stationed in California to encourage investment in Chickasaw businesses would be immune from California income tax. The Tribe (at Br. 46-47) acknowledges that the Treaty could not possibly have been intended to achieve such results — but it is unable to explain why its reading would not produce them.

For its part, the United States appears to contend (at Br. 27) that the Treaty precludes any state law that governs *individual* Chickasaws. But as we explain in our opening brief (at 43-44), this approach would bar the imposition of *any* state law on *any* Chickasaw *anywhere* in the country. If, on the other hand, the Treaty is understood to operate only within the Chickasaws' "limits west" (that is, in Chickasaw Indian country), it is impossible to understand — and the United States makes no attempt to explain — why the Treaty bars a state tax on persons living *outside* Indian country.[21] Indeed, the United States recognizes (at Br. 28-29) that "Oklahoma may assess its residents for the privilege of enjoying the services the State provides to them." And while the United States complains (at Br. 29) that "a tax upon the wages of a Chickasaw nation member-employee * * * is in no way tailored to reflect the costs imposed upon Oklahoma by the fact that the tribal member resides within the State," it is preposterous to suggest that the State may impose only user fees that somehow are "tailored to reflect the costs imposed upon Oklahoma by the fact that the tribal member resides within the State." *Ibid.* States provide innumerable services and benefits to their residents, most of which have values

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[21] It is no answer to argue, as do the United States (at Br. 27 & n.16) and the Tribe (at Br. 45 n.41), that the treaty must be interpreted in accordance with the since-repudiated view that an income tax is a tax on the source of the income. In the understanding of the Treaty's drafters, no person employed by the Chickasaw government ever could be subject to a State's income tax — because no such person would be within the territory of a State. Thus, the federal instrumentality doctrine later articulated in *Dobbins* v. *Commissioners of Erie County*, 41 U.S. (16 Pet.) 435 (1842), would have been irrelevant to the Treaty's drafters. The point of the Treaty was to guarantee that no State would displace Chickasaw authority over persons or property within Chickasaw "limits west"; here, the State has not asserted its authority at all within those limits.

that cannot be precisely calculated (see, *e.g.*, *Cotton Petroleum*, 490 U.S. at 190); a tax on income therefore universally is regarded as a fair method of determining each resident's proper contribution to the state fisc.

In fact, as we explain in our opening brief (at 45-46), the point of the Treaty of Dancing Rabbit Creek was to place the Tribe wholly outside the jurisdiction of any State. As both the United States (at Br. 26-27) and the Tribe (at Br. 4-5) recognize, the United States believed itself effectively powerless to protect the Choctaw and the Chickasaw from the application of state law so long as they remained within state borders. The Treaty therefore accomplished its purpose by giving the Choctaw (and later the Chickasaw) exclusive jurisdiction over lands that were *not* embraced within a State. See A. DeRosier, *The Removal of the Choctaw Indians* 123 (1970) (principal concern of the Choctaw in the negotiations preceding the Treaty was their demand for "a perpetual guarantee that the United States would never try to possess the Choctaws' new home in the West"). But Congress subsequently abrogated the Treaty's enforcement mechanism and rendered nugatory its premise — that there would be minimal contact between Chickasaws and non-Indians because Indian Territory "would be 'free of white men except for a few soldiers'" (U.S Br. 26, quoting DeRosier, *supra*, at 104) — by allotting the Chickasaw lands and then incorporating them within the State of Oklahoma.

In saying this, we do not contend that the admission of Oklahoma to the Union overrode the Treaty's prohibition of state laws "for the government of the [Chickasaw] Nation." See U.S. Br. 28; Resp. Br. 47, 48 & n.44.[22] But this background confirms that the language of the Treaty, which gave the Chickasaw Nation

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[22] We therefore do not contend, as the Tribe asserts (at Br. 47), that the prohibition of such laws was "redundant surplusage" that was rendered nugatory by abrogation of the treaty provision declaring that Chickasaw lands would never be embraced within a State or Territory. Having said that, however, it is difficult to see what force that language *could* have had so long as Chickasaw lands were outside the borders of any State or Territory.

jurisdiction over persons and property within their limits west "*so that* no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation," was designed only to preserve the operation of tribal government within the Chickasaw lands. And the Court's decisions (cited at our opening Br. 47) make plain that, in light of intervening legislation, interpretation of the Treaty must accommodate Oklahoma's legitimate interest in taxing conduct involving Chickasaws that has effects or imposes burdens upon the State outside of Indian country.

CONCLUSION

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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OCTOBER TERM, 1994

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v.

CHICKASAW NATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether Oklahoma's motor fuels excise tax may be imposed upon fuel sold by Chickasaw Nation retail stores on tribal trust land.

2. Whether Oklahoma's income tax may be imposed upon members of the Chickasaw Nation who are employed by the Nation but who reside outside of Indian country.

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INTEREST OF THE UNITED STATES

This case concerns the taxing authority of Oklahoma over the Chickasaw Nation and its members. Because the United States has a special relationship with the Chickasaw Nation and other Indian Tribes and holds the land at issue in trust, it has an interest in the development of sound principles of taxation in this setting.

STATEMENT

1. Respondent Chickasaw Nation (Tribe) is a federally recognized Indian Tribe on whose behalf the United States holds lands in Oklahoma in trust. The Tribe commenced this suit in 1991 seeking an injunction barring petitioner

Oklahoma Tax Commission from enforcing six state taxes against the Tribe and its members. Pet. App. 2a. Two taxes remain at issue at this stage of the litigation.

First, Oklahoma imposes a 16-cents-per-gallon excise tax on motor fuels. See Okla. Stat. Ann. tit. 68, §§ 501-531 (West 1992). The Tribe owns and operates, on tribal trust land, two retail convenience stores that sell such fuel. The Commission generally exempts from the tax fuel sold by the Tribe's stores to its members, but not sales to other persons. Pet. App. 12a-13a. The Tribe argued that the legal incidence of the fuel tax falls on the retailer, and that it is therefore unlawful to impose that tax on fuel sold by the Tribe. Second, Oklahoma imposes a tax "upon the Oklahoma taxable income of every resident or nonresident individual" (Okla. Stat. Ann. tit. 68, § 2355 (West 1992)). The Tribe argued that it is unlawful to impose the income tax on the wages of its 275 employees, who work on tribal trust land. Pet. App. 33a.

2. The district court upheld imposition of the fuel tax to fuel sold by the Tribe's stores, holding that the State's interests outweigh those of the Tribe. Pet. App. 35a-37a. The court noted that States have an interest in raising revenues, and that that interest is strongest when the tax is directed at goods whose value derives from off-reservation activity, and when the taxpayer benefits from state services. *Id.* at 36a. Those factors are present here, the court reasoned, because the Tribe's stores are engaged solely in resale, because revenues from the tax finance construction of roads outside Indian country, and because the fuel is mostly used on roads outside Indian country. *Id.* at 36a-37a. The court also observed that, in practice, fuel taxes are "included in the retail price at the pump," *id.* at 35a, and that exempting the Tribe's stores from the tax would allow the Tribe "to market an exemption from state taxation to persons who would normally do their business

elsewhere." *Id.* at 37a (quoting *Washington* v. *Confederated Tribes of the Colville Indian Reservation* (*Colville*), 447 U.S. 134, 155 (1980)). Finally, the court held (Pet. App. 38a) that the Tribe's challenge to the income tax had been mooted by a recent decision of the Tenth Circuit holding that, absent congressional authorization, a State may not tax the income of tribal members who work on a reservation, but it may tax the wages of employees who are not members of the Tribe. *Sac and Fox Nation* v. *Oklahoma Tax Comm'n*, 967 F.2d 1425, 1428-1430 (1992), vacated in part, 113 S. Ct. 1985 (1993).

3. On appeal by the Chickasaw Nation, the court of appeals held that the Commission cannot apply the motor fuel tax to fuel sold by the Tribe's stores. The district court had erred, the court of appeals explained, in applying a balancing inquiry based on the "economic assumption[]" that the tax is passed along to fuel purchasers. Pet. App. 13a, 16a. Instead, the pertinent issue is whether the legal incidence of the fuel tax falls upon the tribal retailers, as determined by a "fair interpretation of the taxing statute as written and applied." *Id.* at 9a (quoting *California Bd. of Equalization* v. *Chemehuevi Tribe*, 474 U.S. 9, 11 (1985) (per curiam)); Pet. App. 13a.

The court of appeals found "the clear import" of the Oklahoma tax code to be that the fuel tax falls on the retailer and that a distributor is a mere "transmittal agent for the taxes imposed on the retailer." Pet. App. 13a-14a. The distributor is required to remit to the State, "*on behalf of a licensed retailer*," the amount of fuel taxes due, *id.* at 13a (quoting Okla. Stat. Ann. tit. 68, § 505(B)-(C) (emphasis added)), and, if a distributor is unable to recover taxes due from a retailer, it may receive a credit against its tax liability in the unpaid amount of those taxes. Pet. App. 13a. By contrast, the court observed, state law requires the retailer to pay the tax to the distributor, and

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thus the retailer is legally "responsible for paying the tax." *Id.* at 14a (citing Okla. Stat. Ann. tit. 68, § 505).

Similarly, the court of appeals concluded that, as between the retailer and the retail purchaser, the tax falls on the retailer. Oklahoma's fuel tax law (unlike its cigarette tax law) does not require the tax to be included in the retail price charged to customers. Pet. App. 13a. And while the tax imposed on the retailer may in fact "ultimately [be] passed on to the consumer at the pump, * * * [t]he question of who bears the ultimate economic burden of the tax is distinct from the question of on whom the tax has been imposed." *Id.* at 14a (citing *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 151 n.15 (1980), and *Memphis Bank & Trust Co.* v. *Garner*, 459 U.S. 392, 397 (1983)). Because the fuel tax is directly imposed on the Tribe's stores, the court of appeals concluded that "preemption is presumed absent an explicit statement from Congress that state law shall apply," and here Congress has made no such statement. Pet. App. 15a-16a.

The validity of the income tax was largely resolved by *Oklahoma Tax Comm'n* v. *Sac and Fox Nation*, 113 S. Ct. 1985 (1993), handed down while this case was pending on appeal. Pet. App. 20a. In *Sac and Fox*, this Court held that the principle of *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164 (1973), that a State may not tax Indians who reside on a formal reservation applies as well to Indians who live elsewhere within Indian country. 113 S. Ct. at 1992.[1] Based on that decision, the court of appeals held that Oklahoma may not tax the income of members of the Chickasaw Nation who live and work on trust lands.

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[1] Indian country includes "formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States." *Sac and Fox*, 113 S. Ct. at 1991 (citing 18 U.S.C. 1151).

Pet. App. 23a. This Court, however, had declined to review the Tenth Circuit's ruling in *Sac and Fox* that a Tribe's employees who are not tribal members do not enjoy an immunity from state taxation. 113 S. Ct. 466 (1992). Accordingly, the court of appeals held in this case that Oklahoma may tax the income of a Tribe's nonmember employees unless doing so conflicts with a treaty or statute or "impermissibly interfere[s] with a tribe's ability to govern itself," and that taxing the income of the Chickasaw Nation's nonmember employees does neither. Pet. App. 21a. That ruling is not at issue here.

The court of appeals held, however, that Oklahoma may not tax the wages of members of the Chickasaw Nation who work for the Tribe itself, even if they reside outside Indian country. It reasoned that those members do not enjoy the "*McClanahan* presumption" that bars state taxation absent congressional authorization, because residence in Indian country is an important component of that presumption. Pet. App. 25a. However, the court held that such a tax is invalid if it either interferes with tribal self-government or impairs a right granted or reserved by federal law, *id.* at 27a, and that the Chickasaw Nation's treaty with the United States establishes such a right. In the court's view, that treaty confers broader rights upon Indians than does the United States' treaties with other Tribes, *id.* at 27a-30a, because it provides that "no territory or state shall ever have [a] right to pass laws for the government of the [Chickasaw Nation] and their descendants," and that "the U.S. shall forever secure said [Chickasaw] Nation from, and against all laws" inconsistent with that treaty. *Id.* at 28a-29a (quoting 7 Stat. 333). The court concluded that the treaty makes "abundantly clear" that Oklahoma may not apply its income tax to present-day tribal members who work for

the Tribe, and that "[r]esidency is simply not relevant to this determination." Pet. App. 29a-30a.

SUMMARY OF ARGUMENT

I. In the area of state taxation of Indian Tribes and tribal members, this Court has long applied a *per se* rule, under which such taxation is prohibited except where expressly authorized by Congress. The court of appeals, having determined that under state law the legal incidence of Oklahoma's motor fuels tax falls on the Indian retailers, correctly recognized that the *per se* rule applies, and that, absent congressional authorization, Oklahoma lacks jurisdiction to impose that tax on Indian retailers.

The Commission's claim that the *per se* rule should be replaced with a broad-ranging balancing inquiry should be rejected. The immunity that Tribes have long enjoyed from state taxation is rooted in the Constitution itself, which recognizes the retained sovereignty of Tribes vis-a-vis the States and the immunity from taxation as a hallmark of their distinct sovereign status. The continuing immunity from state taxation also reflects the fact that a State's power to tax Indians directly could disrupt the Tribe's ability to govern itself, and that a State can usually achieve its legitimate fiscal and regulatory objectives by imposing the tax upon the non-Indian participants in a transaction. In this case, to render fuel sold by tribal retailers to non-Indians taxable, Oklahoma need only amend its fuel tax law to place the legal incidence of the tax either on the non-Indian fuel distributors or purchasers. That is the approach taken by other States with large Indian populations, including the Commission's *amici*. The *per se* rule also has the advantages of practicality and clarity, as these *amici* recognize.

The court of appeals reasonably concluded that the legal incidence of the fuel tax falls on the retailer, based on the

structure of Oklahoma's fuel-tax code. The Commission's claim that the Hayden-Cartwright Act, 4 U.S.C. 104, authorizes direct state taxation of Indians was not raised below or in the petition for certiorari. In any event, that Act does not make it "unmistakably clear" that States may tax Tribes or individual Indians, *County of Yakima* v. *Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992), because it does not specifically refer to Indian reservations or to Indians who sell or buy motor fuel.

II. The Chickasaw Nation's treaty with the United States precludes Oklahoma from taxing the income of members of the Tribe who work for the Tribe. That treaty, which resulted from unique historical factors, confers upon the Tribe unusually explicit immunity from state regulation: It protects tribal descendants against any state laws "for the government of the [Chickasaw] Nation." Income taxation of tribal-member employees is clearly such a law, and any ambiguity in the construction of the treaty must be resolved in favor of the Tribe.

ARGUMENT

I. OKLAHOMA MAY NOT APPLY ITS EXCISE TAX ON MOTOR FUEL TO FUEL SOLD BY THE CHICKASAW NATION'S RETAIL STORES

1. In many areas involving the application of state law to matters involving Indians in Indian country—especially in the relations of non-Indians with Indians—this Court has engaged in a particularized inquiry into the federal, tribal, and state interests at stake. "The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California* v. *Cabazon Band of Mission Indians*, 480 U.S.

202, 216 (1987) (quoting *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324, 334-335 (1983)); see also *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 176-177 (1989); *Ramah Navajo School Bd.* v. *Bureau of Revenue*, 458 U.S. 832, 838-839 (1982).

However, "[i]n the special area of state taxation of Indian tribes and tribal members, [the Court] ha[s] adopted a *per se* rule." *Cabazon*, 480 U.S. at 215 n.17; see also *Yakima*, 502 U.S. at 258, 267 (noting this "categorical approach"); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148 (1973). Under that rule, state taxation of Tribes and individual Indians is permitted only where authorized by Congress. Congress "has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear." *Cabazon*, 480 U.S. at 215 n.17 (quoting *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 765 (1985)); *Yakima*, 502 U.S. at 258. The Court has applied this principle in holding that States may not tax income earned by Indians on their reservation, *McClanahan*, *supra*, Indian-owned personal property situated on the reservation, *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480-481 (1976); *Colville*, 447 U.S. at 163-164; *Bryan* v. *Itasca County*, 426 U.S. 373 (1976), or on-reservation sales and purchases by tribal members. *Department of Taxation & Finance* v. *Milhelm Attea & Sons*, 114 S. Ct. 2028, 2031 (1994); *Yakima*, 502 U.S. at 258; *Moe*, 425 U.S. at 475-481; *Colville*, 447 U.S. at 160.

Accordingly, in analyzing the application of a state tax to goods purchased by non-Indians from Indian retailers within Indian country, the critical determination is which party bears the legal incidence of the tax. If the tax falls upon the retailer, it is subject to the *per se* rule barring state taxation of Indians absent an "unmistakably clear"

showing of congressional authorization. However, if the tax falls upon the purchaser, then the State may ordinarily impose the tax, *Chemehuevi*, 474 U.S. at 12; *Colville*, 447 U.S. at 150-151; *Moe*, 425 U.S. at 482, and it may also impose upon the Indian retailer the "minimal burden" of collecting the tax from the purchasers. *Milhelm Attea*, 114 S. Ct. at 2035; *Colville*, 447 U.S. at 151; *Moe*, 425 U.S. at 482, 483.[2] The determination of the party on whom the legal incidence of a state tax falls is to be based upon "a fair interpretation of the taxing statute as written and applied." *Chemehuevi*, 474 U.S. at 11.

2. a. In holding that the Commission could not apply Oklahoma's excise tax on motor fuels to sales by tribal retailers to non-Indian consumers, the court of appeals applied those familiar principles. It first held that a fair interpretation of Oklahoma's motor fuels tax statute is that the legal incidence of that tax falls upon the Indian retailer, not the consumer. Pet. App. 13a-14a. It next held

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[2] Even where the legal incidence of a tax falls on the non-Indian purchaser, a State's authority is not unlimited, for it remains subject to the Court's particularized balancing inquiry. The basis for state taxation is strongest when Indians "impor[t] a product onto the reservations for immediate resale to non-Indians," and thus are merely marketing an exemption from state tax. *Cabazon*, 480 U.S. at 219; see *Colville*, 447 U.S. at 155. But when Indians sell items or services that have value generated in Indian country by activities in which Indians have a significant interest, state taxation is preempted. *Cabazon*, 480 U.S. at 219-222; *Indian Country, U.S.A., Inc.* v. *Oklahoma*, 829 F.2d 967, 983-987 (10th Cir. 1987), cert. denied, 487 U.S. 1218 (1988). Analogously, when the legal incidence of a tax falls on a non-Indian retailer who sells to Indian purchasers, that tax may not be imposed if it implicates significant Indian interests or value generated in Indian country and the commerce in question is subject to pervasive federal regulation. See *Warren Trading Post Co.* v. *Arizona Tax Comm'n*, 380 U.S. 685, 688-691 (1965); *Central Machinery Co.* v. *Arizona Tax Comm'n*, 448 U.S. 160, 163 (1980).

that, because there is no "explicit grant of congressional approval" to impose such a tax on Indian retailers, Oklahoma lacks jurisdiction to do so. *Id.* at 16a.

In light of the straightforward application of precedent below, the Commission's principal argument is nothing less than an attack on the *per se* rule itself, which the Commission asks the Court to discard as an empty "formalism." Br. 13, 14. The Commission urges that the inquiry should instead be whether the state interests served by imposition of such a tax on Indians outweigh the tribal interests at stake. Br. 14-33. But the *per se* rule in this area has deep constitutional and historical roots and is supported by sound policy considerations. Congress has not altered that rule, and the Commission offers no valid reason for this Court to replace it with a broadranging balancing inquiry.

b. The Federal Government's power over Indian affairs derives from the Commerce Clause of the Constitution, Art. I, § 8, Cl. 3, and "from the necessity of giving uniform protection to a dependent people." *Williams* v. *Lee*, 358 U.S. 217, 219 n.4 (1959) (citing *United States* v. *Kagama*, 118 U.S. 375 (1886)). The Commerce Clause grants to Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, Cl. 3. The vesting of power in Congress over these three aspects of commerce reflects the Framers' firm determination to supply a check against actions by any one State that might be inconsistent with the interests of the Nation as a whole. See, *e.g.*, *Wardair Canada, Inc.* v. *Florida Dep't of Revenue*, 477 U.S. 1, 7-8 (1986); *McLeod* v. *J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). Of particular relevance here, the decision to vest Congress with exclusive power over Indian affairs constituted a deliberate departure from the arrangement under the Articles of Confederation, which had sought to

divide authority over that subject between Congress and the States.

The Articles of Confederation had granted Congress "the sole and exclusive right and power * * * of regulating the trade and managing all affairs with the Indians"; but that grant of authority excepted Indians who were "members of any of the States," and it was subject to a proviso "that the legislative right of any State within its own limits be not infringed or violated." Art. IX. James Madison explained that that ambiguous reservation of authority to the States was an "endeavor to accomplish impossibilities," because it sought "to reconcile a partial sovereignty in the Union, with complete sovereignty in the States." *The Federalist* No. 42, at 269 (C. Rossiter ed. 1961). The division of authority also proved unsatisfactory in practical operation, because the proviso was relied upon by Georgia and North Carolina as authority for them to make treaties with the Indians regarding their land and other objects, and thereby "to annul the power itself." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

In response to those difficulties—and to the resulting potential for individual States to undermine the security of the United States and their collective commitments to the Indians—a committee of the Continental Congress submitted a report in August 1787, while the Constitutional Convention was sitting. The committee recommended that if the States did not cede the Indian territory within their borders to the United States, they should "accede to Congress's managing, exclusively, all affairs with the Cherokees, Creeks, and other independent tribes within the limits of said States, so that Congress in either case may have the acknowledged power of regulating trade, and making treaties with those tribes, and of preventing on their lands, the intrusions of the white people." 33 J. Continental Cong. 460 (1936); see

Worcester, 31 U.S. (6 Pet.) at 559. The Framers embraced the latter solution, and, "[w]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 234 (1985) (*Oneida II*). Accordingly, the Constitution gives the President, with the advice and consent of the Senate, the power to make Treaties, including Treaties with the Indians (Art. II, § 2, Cl. 2); declares those Treaties to be "the supreme Law of the Land" (Art. VI, Cl. 2); and vests in Congress, unencumbered by the reservations of state authority under the Articles of Confederation, the power to regulate commerce "with the Indian Tribes."[3] Moreover, the parallel phrasing of the Indian and Foreign Commerce Clauses—both referring to commerce "with" the Tribe or Nation—confirms that the Framers contemplated the continuation, through the national government, of bilateral relations between the United States and the Indian Tribes as distinct sovereign entities. *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 159 & n.19 (1982).[4]

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[3] See *Oneida II*, 470 U.S. at 234-235 n.4 ("Madison cited the National Government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation, and urged adoption of the Indian Commerce Clause, Art. I, § 8, Cl. 3, that granted Congress the power to regulate trade with the Indians."); Abel, *The Commerce Clause in the Constitutional Convention and the Contemporary Comment*, 25 Minn. L. Rev. 432, 467-468 (1941).

[4] See *Worcester*, 31 U.S. (6 Pet.) at 559 ("The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties."); see also *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (Tribes are "domestic dependent nations").

This Court's early decisions reflected the understanding "that Indian tribes were wholly distinct nations within whose boundaries 'the laws of [a State] can have no force,' " and with whom all intercourse was to be conducted by the United States. *Mescalero Apache*, 462 U.S. at 331 (quoting *Worcester*, 31 U.S. (6 Pet.) at 560); see also *Yakima*, 502 U.S. at 257. Over time, that conception of exclusive Indian sovereignty has given way to a recognition that, in light of the increasing interaction between (and economic interdependence of) non-Indians and Indians, States should have some latitude to protect their valid interests when affected by activities in Indian country. *Yakima*, 502 U.S. at 257-258. Thus, the Court has recognized "the rights of States, absent a congressional prohibition, to exercise criminal (and, implicitly, civil) jurisdiction over non-Indians located on reservation lands," and to regulate their relations with Indians "unless the application of state laws 'would interfere with reservation self-government or impair a right granted or reserved by federal law.' " *Ibid.* (quoting *Organized Village of Kake* v. *Egan*, 369 U.S. 60, 75 (1962)).

At the same time, this Court has adhered to the *per se* rule in the area of state taxation of Tribes and their members. *Yakima*, 502 U.S. at 258, 267; *Cabazon*, 480 U.S. at 215 n.17; *Mescalero Apache*, 411 U.S. at 148. The continuing immunity of Indians from state taxation in Indian country is rooted in the Constitution itself and in the tradition of relations with the Indian Tribes. Most significantly, the power to tax members of a political community is a core hallmark of sovereign authority. Direct state taxation of a Tribe or its members would impinge the Tribe's historic sovereignty, as reflected in the Constitution's grant of authority to Congress to regulate commerce "with the Indian Tribes," and in the

exclusion of "Indians not taxed" from the enumeration upon which the apportionment of Representatives and direct taxes is based. Art. I, § 2, Cl. 3; *id.* Amend. XIV, § 2. Second, a State's power to tax could be abused to disrupt the Indian sovereign's ability to govern itself:

> In the area of state taxation, * * *, Chief Justice Marshall's observation that "the power to tax involves the power to destroy," *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819), has counseled a more categorical approach: "[A]bsent cession of jurisdiction or other federal statutes permitting it," we have held, a State is without power to tax reservation lands and reservation Indians.

Yakima, 502 U.S. at 258. Third, it is unnecessary for a State to tax a Tribe or its members directly, because a State can typically achieve its legitimate regulatory objectives by imposing the tax upon the non-Indian participants in the transaction, such as the non-Indian purchasers of goods from reservation Indians. Thus, "the federal tradition of Indian immunity from state taxation is very strong and * * * the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case." *Cabazon*, 480 U.S. at 215 n.17.[5] In the rare case where a sound reason

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[5] Claiming that the decision below imposes "a dramatic restriction on state taxing authority" (Br. 14), the Commission argues that this Court has abandoned the *per se* rule in favor of a "presumption" (Br. 19) against state jurisdiction to impose direct taxes on Indians that may be overcome by a "compelling" state interest (Br. 22). However, the cases on which the Commission relies do not support that proposition, but instead indicate that the *per se* rule is "categorical," *Yakima*, 502 U.S. at 258, and that the "presumption" against direct taxation of Indians in Indian country may be overcome only by a showing of express congressional authorization. See, *e.g.*, *Sac and Fox*, 113 S. Ct. at 1989, 1990, 1993; *Blackfeet Tribe*, 471 U.S. at 765.

exists for taxing a Tribe or its members directly, it is reasonable to expect Congress to authorize such taxation. See *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 514 (1991).

c. The Commission argues (Br. 14, 26) that the application of the *per se* rule in this case "disregard[s] economic realities" and allows the Chickasaw Nation to exploit "an exemption from state taxation" (quoting *Colville*, 447 U.S. at 155) by selling fuel tax-free to non-Indian consumers, thereby drawing business from non-Indian retailers and depriving Oklahoma of revenue. However, to render fuel sold by Indian retailers to non-Indians fully taxable, the State need only amend its fuel tax law to place the legal incidence of its fuel tax not on retailers, but on the ultimate purchasers.[6] Such a tax would be analyzed under this Court's particularized balancing inquiry, and, under *Moe* and *Colville*, there is little doubt that it would be sustained.[7]

The Commission also contends (Br. 30-31) that the *per se* rule fosters ambiguity and invites "gamesmanship and

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[6] It is true that, in other contexts, the "practical operation" (Pet. Br. 31) of a tax is decisive. But the cases on which the Commission relies did not involve the special considerations implicated by direct state taxation of an Indian Tribe or its members. See *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 278-279 (1977) (tax on doing business in State claimed to interfere with interstate commerce); *Detroit* v. *Murray Corp.*, 355 U.S. 489, 492-493 (1958) (tax on government subcontractor claimed to infringe United States's immunity from state taxation). Of course, where a tax does not fall directly on Indians but instead is claimed to interfere indirectly with tribal self-determination, the practical consequences of the tax are highly pertinent. See, *e.g.*, *Milhelm Attea*, 114 S. Ct. at 2035.

[7] To comply with the *per se* rule, however, the Commission would have to expand its exemption for Indian purchasers (which is now limited to those who drive tribally owned vehicles (Pet. App. 12a) to cover all tribal members.

manipulation." On the contrary, as this Court has observed, that rule has the advantage of "practicality," because, by establishing categorically that congressional authorization is necessary before a State may tax a Tribe or its members, the rule sets a clear standard on which both States and Tribes can rely. See *Yakima*, 502 U.S. at 267 (without a *per se* rule, "litigation would surely engulf the States' annual assessment and taxation process, with the validity of each levy dependent upon a multiplicity of factors that vary from year to year, and from parcel to parcel"). Indeed, the Commission's *amici*, who are eleven States with large Indian populations, ask this Court to reaffirm the *per se* rule, because it "provide[s] a reasonably bright-line standard which * * * responds to the need for substantial certainty as to the permissible scope of state taxation authority." S.D. Amici Br. at 1-2. Those eleven States have each taxed fuel sold by Indian retailers to non-Indians, by placing the legal incidence of those taxes either upstream (on the distributor) or downstream (on the consumer) of the retailer. See Br. in Opp. 5-6 & n.6.

3. The Commission also contends (Br. 33-39) that the court of appeals erred in holding that the legal incidence of Oklahoma's fuel tax falls on the Indian retailer. Instead, it claims that the tax falls either on the consumer (Br. 33), or, as it argued in the lower courts, on the distributor (Br. 39). The court of appeals evaluated the State's fuel-tax laws under the correct legal standard—the "fair interpretation" standard of *Chemehuevi*—and the pertinent issue therefore is whether that interpretation was unreasonable. *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983); *Butner* v. *United States*, 440 U.S. 48, 58 (1979); *Propper* v. *Clark*, 337 U.S. 472, 486-487 (1949). Although Oklahoma's tax laws do not explicitly identify the party who bears the legal incidence of the fuel tax, the court of

appeals' holding that it falls on the retailer is the fairer interpretation of those laws, and, in any event, is plainly reasonable.[8]

As the court of appeals recognized (Pet. App. 9a), the fact that the Oklahoma tax code contains no explicit "pass-through provision [] or collection requirement[]" does not alone establish that the fuel tax falls on the retailer, as opposed to the purchaser. *Chemehuevi*, 474 U.S. at 11. However, the structure of that code confirms that the tax is meant to fall on the retailer. The code requires that the distributor remit to the State the amount of fuel taxes due. Okla. Stat. Ann. tit. 68, § 505(B)-(C). However, the code requires the retailer to pay to the distributor all taxes due, *id.* § 505(E), and provides that fuel taxes "remitted by a distributor *on behalf of a licensed retailer* * * * that are subsequently determined to be uncollectible by the distributor may be credited against subsequent motor fuel tax liability imposed by law upon such distributor." *Id.* § 505(C) (emphasis added). Thus, as the court of appeals noted, the State makes the distributor a mere "transmittal agent for the taxes imposed on the retailer." Pet. App. 14a.[9] The tax code contains, however, no comparable

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[8] The court of appeals' nuanced analysis of legal incidence is evidenced by the fact that, in the same opinion, it rejected the Chickasaw Nation's argument that Oklahoma's beer tax falls by law on the Indian retailers, holding instead that the beer tax falls on the distributor. Pet. App. 7a-12a. See also *Indian Country, U.S.A.*, 829 F.2d at 984 (holding that legal incidence of Oklahoma's sales tax falls on consumer, and not, as Tribe claimed, on retailer).

[9] Further evidence that, as between the distributor and the retailer, the fuel tax is imposed at the retail level is supplied by (1) the fact that sales between distributors are exempt from taxation (Okla. Stat. Ann. tit. 68, § 507) but sales from a distributor to a retailer are subject to taxation (*id.* § 505 (E)); and (2) the fact that, for his services as a collection agent, the distributor is authorized to retain 2.5% of the fuel

provisions requiring the purchaser to pay to the retailer all taxes due, or shielding retailers from liability where payments due from an ultimate purchaser proved uncollectible. The absence of such provisions strongly indicates, as the court of appeals concluded, that the legislature intended that the fuel tax be imposed at the retail level. Compare *Chemehuevi*, 474 U.S. at 11-12 (noting that in *Colville*, legal incidence was on the purchaser because "the statutory scheme required consumers to pay the tax whenever the vendor was untaxable," and that the California cigarette-tax scheme at issue likewise "clearly seems to place on consumers the obligation to pay the tax for all previously untaxed cigarettes").

That understanding is confirmed by contrasting Oklahoma's motor-fuel tax laws to its cigarette-tax laws. The cigarette tax is clearly imposed on the ultimate purchaser: the tax code states that that tax is "levied upon the *sale, use, gift, possession, or consumption* of cigarettes" within the State. Okla. Stat. Ann. tit. 68, § 302 (West 1992) (emphasis added); see Pet. App. 13a. No comparable language appears in the fuel-tax code, which instead imposes an excise tax on the fuel at the time that it is first sold by the distributor, whether or not it is ever sold to a consumer. *Id.* § 502 ("There is hereby levied an excise tax * * * upon the sale of each and every gallon of gasoline sold, or stored and distributed."). Furthermore, unlike the cigarette-tax laws, which impose criminal liability on the ultimate purchaser for possessing cigarettes on which the tax has not been paid, *id.* § 306, the fuel-tax laws impose no liability of any kind on a consumer for the purchase, possession, or use of untaxed fuel. However, the fuel-tax

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taxes he collects (*id.* §§ 502, 506A) but the code authorizes no such recompense for the retailer.

laws do make it unlawful for the distributor or the retailer "to sell or offer for sale in this state, motor fuel or diesel fuel while delinquent in the payment of any excise tax due the state" *Id.* § 505(C). The court of appeals thus reasonably concluded that the incidence of the fuel tax falls upon the retailer. Compare *Gurley* v. *Rhoden*, 421 U.S. 200, 205 (1975) (legal incidence of federal gasoline tax falls on producer because "if the producer does not pay the tax, the Government cannot collect it from his vendees").[10]

The Commission argues (Br. 36) that the tax code's exemptions for sales to various classes of fuel purchasers[11] establish that the tax is imposed on the purchaser. However, the existence of such exemptions does not establish the incidence of that tax. Exemptions routinely exist in tax codes in which the incidence of the tax falls earlier in the distribution chain, including the codes of States that impose a fuel tax on the distributor. See Br. in Opp. 5-6 n.5; *e.g.*, Ariz. Rev. Stat. Ann. §§ 28-1501, 28-1520 (West Supp. 1993); Cal. Rev. & Tax. Code Ann. §§ 7351, 7401 (West Supp. 1994); Mont. Code Ann. §§ 15-70-204, 15-70-221 (1993); N.Y. Tax Law §§ 284, 289-c (McKinney 1986); N.C. Gen. Stat. §§ 105-434(a), 105-439 (1994); see also *Gurley*, 421 U.S. at 205-206 (existence of exemptions for certain purchasers in federal gasoline tax statute "is not proof that Congress laid the tax upon the purchaser-consumer"). Such exemptions ensure that persons earlier in the

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[10] Contrary to the Commission's claim that the retailer's duty to pay taxes is unenforceable (Br. 38 n.20), the tax code confers upon the Commission itself the power "to enforce the provisions of this Code and to promulgate any reasonable rules and regulations with respect thereto." Okla. Stat. Ann. tit. 68, § 203 (West 1992).

[11] Exempt purchasers include the United States (Okla. Stat. Ann. tit. 68, §§ 501(B), 502.2(B),, 502.3(B),, 502.4(B),, 502.5(B),, 502.6(B),, 502.7(B), farmers (*id.* § 509(B)), specified aircraft (*id.* § 508(a), passenger buses or coaches (*id.* § 509.2(E)), and fire departments (*id.* § 527).

distribution chain do not need to charge the protected purchasers a price that includes a premium reflecting all or some of the State's fuel tax. See, *e.g.*, Okla. Stat. Ann. tit. 68, § 509(e)-(f) and (j) (distributor may deduct amount of fuel sold to exempted agricultural purchasers from amount upon which it must remit tax to State).[12]

4. The Commission's final claim (Br. 23-24) is that the Hayden-Cartwright Act, 4 U.S.C. 104, authorizes direct state taxation of retail sales of fuel by Indian Tribes and tribal members in Indian country. See also S.D. Amici Br. 4-23. The Commission did not raise that claim below, see Pet. App. 16a n.4, or present it in the petition for certiorari, which instead posed the question whether imposition of the State's motor fuel tax on fuel sold by a Tribe is "precluded" by "principles of federal pre-emption

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[12] The phrasing of two code provisions could be read to imply that the consumer will bear the fuel tax. See Okla. Stat. Ann. tit. 68, § 501(C) ("Nothing in this section shall require a distributor, dealer or retailer to collect taxes levied by this act or remit taxes to the state."); *id.* § 509(A) ("Every person actually engaged in farming * * * who has obtained an agricultural exemption permit * * * may purchase such motor fuel without paying the tax."). But no other provision is phrased in that fashion, and another carries the contrary implication by describing an exemption for aircraft fuel as one to which the distributor is "entitled." *Id.* § 508(a). In any event, the fact that the code obliges the retailer to pay the tax, and protects the distributor from a nonpaying retailer while containing no like provisions governing the retailer-to-purchaser step in the distribution chain, is far more powerful evidence of the state legislature's intent regarding legal incidence than the wording of those two provisions. The Commission also relies upon two provisions (*id.* §§ 501(B), 509.2(C)) that render liable a fuel user who fraudulently buys diesel fuel claiming a use exemption and then uses the fuel for a nonexempt purpose. Br. 36. But the imposition of liability on a person who fraudulently claims an exemption does not speak to the issue of whether consumers in general bear the tax, but, rather, merely reflects that the party responsible for defrauding the State of that tax is properly responsible for reimbursing the State for the lost revenue.

or Indian sovereignty." Pet. I. Review is therefore unwarranted. See *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425, 427 (1993) (per curiam) (Court will consider issues first raised in a merits brief "only in the most exceptional cases"); *Berkemer* v. *McCarty*, 468 U.S. 420, 443 n.38 (1984).

In any event, the Hayden-Cartwright Act does not make it "unmistakably clear," *Yakima*, 502 U.S. at 258; *Cabazon*, 480 U.S. at 215 n.17, that Congress intended to abrogate the traditional immunity of tribal retailers from state taxation. The Act provides, in pertinent part:

> All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authority of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.

4 U.S.C. 104(a). The Act does not mention Indians. As a result, it does not make clear whether the expression "other reservations" applies to Indian reservations, or merely to other reserved land (*e.g.*, national parks or national forests) in the control of the federal government. See *White Mountain Apache*, 448 U.S. at 151-152 n.16 (leaving this question open). The absence of any express reference to Indian reservations is notable, because the Act was added as a floor amendment in the Senate in 1936

to An Act to Amend the Federal Aid Highway Act, 49 Stat. 1519-1522, and the highway statute specifically refers elsewhere to "Indian reservation[s]" and "Indian lands." See § 6, 49 Stat. 1521 (providing for construction and improvement of "Indian reservation roads"); § 3, 49 Stat. 1520 (providing for construction and maintenance of roads "through unappropriated or unreserved public lands, nontaxable Indian lands, or other Federal reservations other than forest reservations").[13] Moreover, even if we assume, *arguendo*, that the Act applies to sales on Indian reservations (and thus implicitly elsewhere within Indian country), the Act does not clearly state that it applies to sales on reservations by *Indian* retailers, or distinguished from non-Indian "licensed traders" and "filling stations."

Application of the Hayden-Cartwright Act to fuel sold by Indian retailers on Indian reservations does not necessarily follow from the purpose of the highway statute in which it was enacted. That statute was passed in 1936 to assist States in highway building programs by providing matching funds. The Hayden-Cartwright Act was added to the legislation to respond to the practice of motorists who purchased gas on federal reservations, thereby escaping state gas taxes. See 80 Cong. Rec. 6913 (1936) (Sen. Hayden). But there was no evidence before Congress, and there were no assertions by legislators, that tax-exempt sales by Indians on Indian reservations had lured customers from non-Indian retailers. Nor does the legislative history contain any discussion of Indians' traditional immunity from direct state taxation. See *id.* at 6907-6914, 8698-8705. It is thus most likely that, in passing

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[13] Compare 80 Cong. Rec. 6908 (1936) (Sen. Hayden, sponsor of bill, describes Section 6 as relating to "Indian reservation roads") with *id.* at 6913 (1936) (Sen. Hayden describes Section 10 as relating to "Government reservations not for governmental use").

the Act, Congress did not consider at all its effect on that immunity.[14] Because it is not "unmistakably clear" (*Yakima*, 502 U.S. at 258) that Congress intended to abrogate that immunity by passing the Hayden-Cartwright Act, the Commission's reliance on the Act as a basis for taxing Indian retailers is misplaced. See also

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[14] The Commission (Br. 23-24) and its amici (S.D. Amici Br. 5-6.) rely on a 1940 opinion of Solicitor of the Interior Margold taking the position that the Act authorizes a State to tax sales of gasoline through commissaries on an Indian reservation. See *Application of Federal and State Taxes to Activities of Menominee Indian Mills*, 57 Interior Dec. 129, 138-140 (1940). That opinion was noted, with neither approval nor disapproval, by Felix Cohen in his treatise on Indian law. See F. Cohen, *Handbook of Federal Indian Law* 264 (1942); see also R. Strickland, et al., *Felix Cohen's Handbook of Federal Indian Law* 412 n.62 (1982); compare S.D. Amici Br. 6 n.2 (claiming that Cohen treatise "agreed" with Solicitor Margold's conclusion). But Solicitor Margold's opinion began by noting that "[i]t is not clear * * * whether the reference to reservations includes Indian reservations." 57 Interior Dec. at 138-139. His conclusion that it did was based on "indications" in the legislative history that, "while slight," suggested that the Act did so apply. *Id.* at 139. Those "indications" were that Section 6 of the highway statute discusses roadways on Indian reservations, suggesting that "attention was called in the consideration of the act to Indian reservations," and that the Act's "reference to 'licensed traders' is particularly suggestive of Indian reservations." *Ibid.* But as we have noted, the absence of a specific reference to Indian reservations in Section 10 (the Hayden-Cartwright Act), in light of the express references to "Indian reservation[s]" and to "Indian lands" elsewhere in the highway statute, may alternatively be viewed as negatively implying that Section 10 does not include Indian reservations. And the term "licensed traders," a term historically associated with non-Indians who trade with Indians, see 16 U.S.C. 261, begs the question of whether the Act was meant to apply to *Indian* retailers of motor fuel. Given Solicitor Margold's view that the Act was not "clear" and his reliance on "slight" indications in legislative history, it is unlikely that he would have concluded that the Act made it "unmistakably clear" that it abrogated Indian immunity from direct state taxation.

South Dakota v. *Bourland*, 113 S. Ct. 2309, 2316 (1993) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit") (quoting *Yakima*, 502 U.S. at 269); *Blackfeet Tribe*, 471 U.S. at 766; *McClanahan*, 411 U.S. at 174; *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930).[15]

II. OKLAHOMA MAY NOT APPLY ITS INCOME TAX TO MEMBERS OF THE CHICKASAW NATION WHO WORK FOR THE NATION BUT WHO LIVE OUTSIDE OF INDIAN COUNTRY

1. Petitioner also argues (Br. 39-47) that the court of appeals erred in holding that the Chickasaw Nation's treaty with the United States bars Oklahoma from taxing the income of tribal members who work for the Tribe but live outside Indian country. That treaty provides in pertinent part:

> The Government and the people of the United States are hereby obliged to secure to the said [Chickasaw] Nation of Red People the jurisdiction and government of all the persons and property that may be within their limits west, so that no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants; and that no part of the land granted them

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[15] Because Congress has not granted authorization, the Commission's additional claim (Br. 32-33) that it is authorized to tax Indian consumers directly for purchasing fuel lacks merit. The Commission relies (Br. 33) on this Court's statement that an automobile registration tax tailored to capture the proportion of automobile use occurring off-reservation "might be a different case" from those in which a direct tax was improperly applied to Indians' on-reservation activity, see *Sac and Fox*, 113 S. Ct. at 1993. However, as in *Sac and Fox*, Oklahoma has not undertaken such tailoring, and it is therefore appropriate, as in that case, to "decline to treat the case as if it had." *Ibid.*

> shall ever be embraced in any Territory or State; but the U.S. shall forever secure said [Chickasaw] Nation from, and against, all laws except such as from time to time may be enacted in their own National Councils, not inconsistent with the Constitution, Treaties, and Laws of the United States; and except such as may, and which have been enacted by Congress, to the extent that Congress under the Constitution are required to exercise a legislation over Indian Affairs.

Treaty of Dancing Rabbit Creek, Sept. 27, 1830, Art. IV, 7 Stat. 333. The treaty was entered into with the Choctaw Indians, but in 1837, the Choctaw consented to the formation of a district within their reservation for the Chickasaw, "to be held on the same terms that the Choctaws now hold it," Treaty of Jan. 17, 1837, Art. I, 11 Stat. 573, thereby making the Chickasaw beneficiaries of the treaty. See *ibid.* The treaty was reaffirmed in 1866, see Treaty of Apr. 28, 1866, Arts. X, XLV, 14 Stat. 774, 779-780, and again in 1871, see 25 U.S.C. 71. Pet. App. 29a & n.10.

The court of appeals correctly read the Treaty of Dancing Rabbit Creek to preclude Oklahoma from taxing the income of member-employees of the Chickasaw Nation, regardless whether they reside in Indian country. As the court of appeals observed (Pet. App. 29a-30a), that treaty confers upon the Chickasaw Nation unusually explicit and broad immunity from the operation of state laws. Compare *Sac and Fox*, 113 S. Ct. at 1988 (terms of Sac and Fox Treaty); *McClanahan*, 411 U.S. at 174 (terms of Navajo Treaty); see Pet. App. 27a-28a. In particular, unlike most other Indian treaties, the Treaty of Dancing Rabbit Creek provides unqualified protection against enactment of state "laws for the government of the [Chickasaw] Nation," and provides that that protection extends to the "descendants"

of the Nation. As the Chickasaw Nation has noted (Br. in Opp. 28), only the Creek Nation and the Seminole Nation—two other of the Five Civilized Tribes—have similarly capacious treaty guarantees.

The provisions of the Treaty of Dancing Rabbit Creek reflect the unusual alliance between the Choctaw and the United States in the early 19th century, and the political importance to the United States of inducing the Choctaw to assent to their removal westward. The Choctaw had fought with distinction alongside the United States in battles against the Creek Indians in 1813 and 1814, and with General Andrew Jackson in the Battle of New Orleans in 1814. See Arthur H. DeRosier, Jr., *The Removal of the Choctaw Indians* 35-36 (1970) [hereinafter DeRosier]; compare *Oneida II*, 470 U.S. at 231. Moreover, peaceful removal of the Choctaw west had long been sought by political figures who viewed such removal as a critical impetus to "force other Indian groups to consider their own removal to the West." DeRosier at 46 (because the Choctaw were "a large tribe that was known for its high level of economic, social, and political development, [its] successful removal * * * would be prestigious and would force other Indian groups to consider their own removal to the West"). The Choctaw had assented to one earlier removal from some of their lands in Mississippi to what is now western Arkansas. See Treaty of Oct. 18, 1820, 7 Stat. 210. However, in 1828, a bill forcibly to remove the Choctaw further west had failed in Congress, and, in 1830, now-President Jackson authorized negotiations with the Choctaw for their removal to lands west of the Mississippi River. DeRosier at 97-112. President Jackson told Congress in 1829 that he would "guarantee[]" land for the Choctaw "for as long as they occupied the land," that the land would be "free of white men except for a few soldiers," and that "removal to such a Utopia would be voluntary, but

if the Indians remained east of the Mississippi River, they would be subject to the laws of the several states." *Id.* at 104. The ensuing negotiations resulted in the Treaty of Dancing Rabbit Creek. *Id.* at 119.

In light of the treaty's broad language and the events preceding it, a state law that taxes the wages the Tribe pays to a member-employee (a "descendant" of the Tribe) is properly regarded as a prohibited "law[] for the government of the [Chickasaw] Nation." That understanding is reinforced by the precept that a treaty is to be read as the Indian signatories would have understood it, with "[d]oubtful expressions * * * resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith." *McClanahan*, 411 U.S. at 174. The Commission argues (Br. 42) that an income tax law would not have been perceived as a law "for the government" of the Chickasaw Nation, because imposition of such a tax "displaces [no] mechanisms of tribal government." But the treaty does not bar only those state laws that disrupt or rearrange tribal government; it bars all laws "for the government of" the Tribe's members. Given the absence of any role for the State over tribal members at the time of the treaty, a law that taxed a member for wages paid by the Tribe on tribal land undoubtedly would have been so regarded. See *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 635 (1970).[16]

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[16] In any event, even if the Commission were correct that the treaty protected members only from laws that "displace[] the mechanisms of tribal government" (Br. 42), and even if the tribal signatories are assumed to have shared in that view, state tax laws at the time were understood to have just that effect. See *Dobbins* v. *Commissioners of Erie County*, 41 U.S. (16 Pet.) 434, 447-449 (1842) (holding, under then-extant federal instrumentality doctrine, that salaries of federal employees were exempt from state taxation, because such taxation constituted interference with federal government).

The Commission also argues (Br. 45-47) that Oklahoma's admission into the Union—which overrode the treaty guarantee that "no part of the land granted [to the Chickasaw] shall ever be embraced in any * * * State"—necessarily also overrode the separate guarantee that "no * * * State shall ever have a right to pass laws for the government" of the Chickasaw Nation. But when Congress admitted Oklahoma, it explicitly provided that "[n]othing contained in [the Oklahoma Constitution] shall be construed to limit or impair the rights of any person or property pertaining to the Indians of said Territories." Oklahoma Enabling Act, ch. 3335, § 1, 34 Stat. 267-268; Pet. App. 29a. See *United States* v. *Dion*, 476 U.S. 734, 738-739 (1986) ("We have required that Congress' intention to abrogate Indian treaty rights be clear and plain," and "[a]bsent explicit statutory language, we have been extremely reluctant to find congressional abrogation.").

The broad language of the treaty does not, of course, deprive Oklahoma of all power over the activities of Chickasaw Indians in the State. Where the conduct of the Indians occurs outside of Indian country, Oklahoma of course remains free to regulate that conduct.[17] It may be that a State would have some authority to act with respect to conduct occurring within Indian country but having substantial effects outside, perhaps subject to the particularized balancing inquiry utilized by this Court. But a tribal member's receipt of wages from the Chickasaw Nation for work performed for the Tribe within its trust lands does not have any such effect. While Oklahoma may assess its residents for the privilege of

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[17] Oklahoma has not acquired general civil or criminal jurisdiction over matters involving Indians in Indian country under Public Law 280 (Pub. L. No. 83-280), 67 Stat. 588, codified as amended at 25 U.S.C. 1321 *et seq.* *Potawatomi Tribe*, 498 U.S. at 513.

enjoying the services the State provides to them, a tax upon the wages of a Chickasaw Nation member-employee (whatever the amount of those wages) is in no way tailored to reflect the costs imposed upon Oklahoma by the fact that that tribal member resides within the State. Cf. *Sac and Fox*, 113 S. Ct. at 1993 (state car registration tax tailored to capture the off-reservation effects of automobile use might be permissible, but a blanket tax is not). Oklahoma may therefore not assert that, solely by living outside Indian country, a Chickasaw Nation descendant who works for the Tribe categorically waives his right under the treaty to be free from state income tax laws.

2. Apart from the distinct immunity from state law conferred on the Chickasaw Nation by the treaty, tribal members have the right to "make their own laws and be ruled by them." See, *e.g.*, *White Mountain Apache*, 448 U.S. at 142 (quoting *Williams* v. *Lee*, 358 U.S. 217, 220 (1959)). This Court has left open the question whether a Tribe's right to self-governance operates "independently of its territorial jurisdiction to pre-empt the State's ability to tax income earned from work performed for the Tribe itself when the employee does not reside in Indian country," *Sac and Fox*, 113 S. Ct. at 1992, and, if so, whether such preemption exists in all cases, or depends upon a "particularized inquiry into the nature of the state, federal, and tribal interests at stake." *Mescalero Apache Tribe*, 462 U.S. at 333. The court of appeals took the position that a particularized showing would be necessary to establish tax immunity, but, because of its reliance on the treaty, it did not consider the various factors germane to that inquiry. Nor does the record in this case contain the facts necessary for such an inquiry. Should the Court hold that the treaty does not resolve the issue of whether the State may tax the income of nonresident member-employees of the Tribe, a remand would be appropriate to

determine whether imposition of that tax would infringe on tribal self-government.[18]

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[18] The circumstances of this case suggest the basis for a substantial argument that the tax infringes on the Tribe's interest in self-government. The income in question is paid by the Tribe to its members as compensation for work performed for the Tribe itself, and it appears that much of that income is received in return for services rendered at tribal headquarters or in connection with tribal administration. See Resp. First Amended Compl. ¶ 36 (tribal employees work, *inter alia*, at tribal headquarters, health center, office of environmental health, central business services office, utility authority, and gaming commission office). Hence, it seems likely that the tax burdens tribal administration by increasing the cost to the Tribe of administering its affairs, in areas subject to tribal jurisdiction. The tax may also impede the Tribe's ability to collect taxes from its employee-members on the income it has paid them, or, alternatively, to compete for employees. That is because Oklahoma, in calculating a resident's income taxes due, does not credit the resident for income taxes paid to a sovereign Tribe, even though the State in other contexts takes steps to avoid double-taxation. See, *e.g.*, Okla. Stat. Ann. tit. 68, § 2358(A)(4) (1992) (resident's income earned in other States is not included in resident's income tax base); see also 2 J. Hellerstein & W. Hellerstein, *State Taxation* ¶ 20.04[2], at 20-14 (1992) ("To avoid double taxation of their residents' income that is attributable to and taxed in other States, all States with broad-based income taxes provide a credit for taxes paid by their residents to other States.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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No. 94-771

In The

Supreme Court of the United States

October Term, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT

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SUPPLEMENTAL BRIEF OF RESPONDENT

In an appendix to its brief, see Resp. Br. 1a-23a, Respondent Chickasaw Nation reproduced the text of legislation then pending before the Oklahoma legislature[1] which would have placed the legal incidence of the state's motor fuel tax on consumers. Noting that effect, Resp. Br. 11, and maintaining that in consequence, adoption of that legislation would moot the first two questions presented by Petitioner Tax Commission (with the exception of any issue concerning Indian-country sales by the Tribe to tribal members), *id.* at 12 & n.12, the Chickasaw Nation suggested that should that legislation be adopted, dismissal of the Writ as improvidently granted might be an appropriate course of conduct, *id.* at 10-13, 49.

As of the date set for filing of the Chickasaw Nation's brief (March 27, 1995), the legislation discussed above had been adopted by the Oklahoma House of Representatives, and was pending before the Oklahoma Senate. But on March 29, 1995, that legislation was defeated before the Senate Rules Committee. Thus, it would be literally accurate to represent to this Court that *that* legislation has now been finally defeated and will not be enacted during the Oklahoma legislature's 1995 legislative session. But such a representation would incompletely describe the current situation in material respect.

As this Court may be aware, Oklahoma's legislative process, like the processes of some other states, permits

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[1] Committee Substitute for H.B. 1522, 45th Okla. Leg., 1st Sess. (1995).

the introduction of "blank" or "shell bills," whose purpose is to allow the "opening up" of a particular title of *Oklahoma Statutes* for possible last-minute amendment. Such a bill currently exists with regard to Title 68 of *Oklahoma Statutes*, which is the title containing the state's fuel-tax provisions. S.B. 574, 45th Okla. Leg., 1st Sess. (1995). Thus, as of April 17, 1995, Title 68 remains "open" to possible late amendment, including amendment of the type proposed in the legislation reproduced in the appendix to the Chickasaw Nation's brief-in-chief.

So as to be able to present this Court with the most up-to-date information concerning relevant developments before the Oklahoma legislature, Respondent Chickasaw Nation, having monitored such developments during the nineteen days following the defeat of H.B. 1522 before the Oklahoma Senate, has deferred to filing of this supplemental brief until one week prior to oral argument.[2] The Chickasaw Nation will continue to monitor legislative developments during the week of April 17-24, and in the event that Petitioner Tax Commission does not address the matter during its oral argument, will, with this Court's permission, report on such developments during the Chickasaw Nation's allotted oral-argument time.

It should be noted that by rule, the 1995 Oklahoma legislature has established May 3, 1995, as the deadline date for the filing of conference committee reports, and

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[2] In order to provide maximum notice to Petitioner Tax Commission, in addition to mailing of the "service" copy, a duplicate copy of this supplemental brief is being sent by overnight delivery to counsel of record for Petitioner.

May 19, 1995 as its adjournment date. The Oklahoma Constitution requires the legislature to adjourn *sine die* no later than 5:00 p.m. on May 26, 1995. *See* OKLA. CONST. art. 5, § 26. With this Court's permission, see SUP. CT. R. 25.5, the Chickasaw Nation will report to this Court concerning relevant legislative developments which occur after oral argument herein.

Respectfully submitted,

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IN THE
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Petitioner

v.

CHICKASAW NATION,

Respondent

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

BRIEF FOR *AMICI CURIAE* THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA, AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF CONVENIENCE STORES AND OKLAHOMA GROCERS ASSOCIATION

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BRIEF FOR *AMICI CURIAE*
THE PETROLEUM MARKETERS ASSOCIATION OF AMERICA AMERICAN PETROLEUM INSTITUTE, NATIONAL ASSOCIATION OF CONVENIENCE STORES, AND OKLAHOMA GROCERS ASSOCIATION

The Petroleum Marketers Association of America (PMAA), the American Petroleum Institute (API), the National Association of Convenience Stores (NACS) and the Oklahoma Grocers Association (OGA) respectfully submit this brief *amicus curiae* in support of the Oklahoma Tax Commission in this case. Written consent to the filing of this brief has been obtained from

all parties. The original letters authorizing consent have been filed concurrently herewith.

INTEREST OF AMICUS CURIAE

The PMAA is a federation of 40 state and regional trade associations representing over ten thousand small business petroleum marketers.[1] Together, PMAA members market approximately 50 percent of the gasoline and 75 percent of the home heating oil sold in America. In addition, they supply over one-half of the Nation's retail motor fuel facilities, approximately three-quarters of which are operated by independent retailers. PMAA members are comprised primarily of jobbers and other wholesale distributors of refined petroleum products as well as chain retailers that market motor fuels through service station outlets.

The API represents the interests of approximately 300 member companies involved in all aspects of the oil and natural gas industry, including exploration, production, transportation, refining and marketing of petroleum products.

NACS is an international trade association representing more than 2,800 retail members and associates. Retail members operate more than 62,000 convenience stores around the world, the majority of which engage in motor fuel sales. Over 70 percent of NACS' members are engaged in the sale of motor fuels at the wholesale or retail levels.

OGA is a professional trade association of retailers, wholesalers, suppliers, and food brokers dedicated to promoting

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[1] A list of the constituent state and regional trade associations that comprise the PMAA is set forth in the Appendix hereto.

the common business interests of the food distribution industry in the State of Oklahoma. Founded in 1938, OGA represents over 1,200 members, a large segment of which operate convenience stores that market gasoline to the motoring public.

The interest of *amici* in this case is direct and substantial. At issue is a decision of the Tenth Circuit Court of Appeals[2] that impacts on the ability of petroleum marketers to compete with retail enterprises established by the Chickasaw Nation. These retailers sell motor fuel to non-members for use almost exclusively on state roads outside of Indian country. Because of their exemption from motor fuel taxes imposed by the State of Oklahoma, an exemption that was created by the court of appeals, Tribal retailers enjoy a significant competitive advantage over every other motor fuel retailer operating in the State. In an industry characterized by intense price rivalry, and with average *combined* wholesale and retail margins running in the neighborhood of fourteen cents per gallon,[3] a cost advantage to Indian retailers of anything approaching the per gallon amount of the excise tax ($0.17 per gallon) would severely disrupt motor fuel markets in the State of Oklahoma and would have a serious adverse effect on competition.

Moreover, the interest of *amici* is directly related to and aligned with the interest of the State of Oklahoma. To the extent that tax-exempt Tribal enterprises gain market share at the expense of existing marketers, the ability of the State to raise revenue through motor fuel excise taxes would be severely diminished. To the extent that the court of appeals' decision is established as the guiding principle for determining the tax-

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[2] The opinion of the court of appeals is reported at 31 F.3d 964.

[3] See p. 11 *infra*.

exempt status of Tribal enterprises, the decision would have far-reaching implications for the Nation's petroleum marketing industry and for the other federal and state jurisdictions that raise revenue through motor fuel taxation.

STATEMENT

For decades, the federal and state governments collected taxes on the sale of motor fuels designated for on-road use, and dedicated the proceeds thereof to the construction and maintenance of the Nation's highway system. The segregation of highway trust funds from general revenues has traditionally been predicated on the notion that motor fuel taxes are, in reality, user fees that should rightfully be reserved for highway use.[4]

The revenues generated from motor fuel taxation at the federal and state levels are used primarily for road construction and maintenance. At the federal level, the majority of motor fuel taxes are dedicated to the highway trust fund.[5] The funds generated by the states as a result of motor fuel taxation are used principally for state highway capital outlay maintenance and administration.[6] The major secondary use for these funds is for

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[4] In the federal system, for example, exemptions in the form of refunds are granted for off-road use, "reflect[ing] a congressional determination that, because the economic burden of such taxes is traditionally passed on to the purchaser-consumer in the form of increased pump prices,... off-highway users should be relieved of the economic burden of the highway program..." *Gurley v. Rhoden*, 421 U.S. 200, 206 (1975).

[5] See, 26 U.S.C.A. §§9503(b)(1)(E) and (b)(4)(B) (1994 Supp.).

[6] FEDERAL HIGHWAY ADMINISTRATION, U.S. DEPT. OF TRANSPORTATION, HIGHWAY STATISTICS 82 (1992).

local roads and streets.[7] In the State of Oklahoma, over seventy percent of motor fuel tax revenue is deposited in the State Transportation Fund for use in highway construction; most of the remainder is given to counties and municipalities for road maintenance. Okla. Stat., tit. 68, §§504, 504.1, 518, 519, 523, 523.1.

The decision of the court of appeals in this case seriously restricts the State of Oklahoma's ability to generate revenues through motor fuel taxation, thus threatening its capacity to allocate the financial burdens of highway construction and improvement to motor fuel users. The court of appeals held that principles of federal pre-emption and Indian sovereignty preclude the taxation of motor fuel sold by Indian retailers, even though the fuel is transported onto Indian country for resale only and used outside of Indian country on roads constructed and maintained by the State. Indian retailers, therefore, are free to market their fuel on a tax free basis, to Indians and non-Indians alike, and to utilize their tax-free license to displace traditional marketers who remit all of the motor fuel taxes.

The result reached by the court below could have far reaching implications that extend to every jurisdiction with Indian lands, including the federal government. Because the court of appeals' decision rests narrowly on an analysis of the "legal incidence" of taxation (the court found that the legal incidence of the tax falls on the retailer and, hence, on the Tribe), the impact on the State's ability to generate revenue cannot be remedied by simply changing the point at which the legal incidence lies. Tribal enterprises could shift their business activities up or down the distribution chain to incur the legal incidence of state taxation

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[7] Less than eight percent of the total is expended for non-highway purposes. *Id.*

in an attempt to obtain a tax exemption and a corresponding price advantage with which no competing petroleum marketer could contend. The inevitable expansion of a tax-free industry at the expense of existing marketers would necessitate a dramatic change in the manner in which highway construction and maintenance are funded.

As will be developed more fully below, the consequences of tax free motor fuel retailing cannot be justified on the basis of Tribal sovereignty or any pervasive federal interest in regulating Indian affairs. For these interests to be implicated, the imposition of motor fuel taxation must have some discernable impact on the Tribe, other than conferring upon it a license to market motor fuel at a substantial price advantage. Here, however, the impact is non-existent. The Tribe is not required to shoulder either the economic burdens associated with taxation or the administrative burdens that attach to the collection and remittance of the tax.

Given the compelling state interest involved, the traditional balancing of interests should come down squarely on the side of the State. This Court has consistently "rejected the proposition that 'principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere'." *Department of Tax. & Fin. v. Milhelm Attea & Bros.*, 114 S. Ct. 2028, 2035 (1994). On the other hand, the power to raise revenue for expenses borne entirely by the State is at the core of state sovereignty.

ARGUMENT

The imposition of state excise or transactional taxes on tribes or tribal members has been the subject of numerous opinions of this Court. *See, e.g., Department of Tax. & Fin. v. Milhelm Attea & Bros.*, 114 S. Ct. 2028 (1994); *Oklahoma Tax Comm.'n v. Sac and Fox Nation*, 113 S. Ct. 1985 (1993); *County of Yakima v. Yakima Indian Nation*, 112 S. Ct. 683 (1992); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). In approaching the issues presented, the Court recognized the different contexts in which tribes seek insulation from the burdens imposed by state taxes, and eschewed generalizations about their validity that might lead to rigid or mechanical applications.

> This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980).

In lieu of the particularized inquiry referred to above, the court of appeals opted for a *per se* rule that presumes the invalidity of the tax on the basis of legal incidence alone. Presumably, the court below would regard any imposition of any tax on the Tribe as being in conflict with its right to self government. While such a rule may exist with respect to the taxation of Indian ownership and activities confined to the

reservation,[8] a tax is not *per se* invalid when applied to products which are used by Indians and non-Indians alike, and which generate expenses that are incurred entirely by the State for the benefit of Indian and other users.

Recognizing that "[a] State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention,"[9] this Court has been careful to distinguish between taxes that are imposed for general revenue purposes and those that effectively represent reimbursement for off-reservation services performed by the State. In *Moe*, for example, the Court distinguished between a motor vehicle registration and license fee, used solely for road and highway purposes, and a personal property tax on motor vehicles that is applied to general revenues. Referring to the decision of the district court, this Court noted in *Moe* that:

> While recognizing, as did the Tribe, that a fee required for registration and issuance of state license plates for a motor vehicle could be exacted from Indians residing on the reservation, the court held that the additional personal property tax which was likewise made a condition precedent for lawful

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[8] *See, e.g., California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n. 17 (1987).

[9] *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 336 (1983). *See also, Sac and Fox Nation*, 113 S. Ct. at 1991; *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 765 n. 16 (1985).

> registration of the vehicle could not be imposed on reservation Indians. *Moe* 425 U.S. at 469.[10]

Similarly, in *Colville*, the Court struck down an excise tax on motor vehicles, ninety-eight percent of which was distributed to the State of Washington's general fund. In so doing, however, the Court noted that "[h]ad Washington tailored its tax to the amount of actual off-reservation use, or otherwise varied something more than mere nomenclature, this might be a different case." *Colville*, 447 U.S. at 163-64.

Where, as here, the motor fuel subject to taxation is for resale only and used almost exclusively on State jurisdiction roads, the tax is of a different character than are taxes imposed on transactions occurring exclusively in Indian country and from which Indians do not benefit from off-reservation services provided by the State. Whether the tax intrudes impermissibly on Indian sovereignty, therefore, requires a balancing of the respective State and Tribal interests. In particular, it requires an examination of the impacts of motor fuel taxation on Tribal sovereignty and the consequences to the State (and the construction and maintenance of its highway system) if tax free Indian enterprises gain a foothold at the expense of tax paying non-Indian marketers.

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[10] The district court's decision in *Moe* is reported at 392 F. Supp. 1297 (D. Mont. 1975). In its opinion, the district court stated that "[u]nlike the registration fee, the motor vehicle property tax is not designated a road tax and is used for general governmental purposes in the same manner as other personal property taxes." 392 F. Supp. at 1326.

A. The State of Oklahoma Has A Compelling Interest In Imposition of the Tax

The motor fuel tax at issue in this case is imposed at the rate of $.17 per gallon on gasoline and $.14 per gallon on diesel fuel, and it generates approximately $320 million annually.[11] This revenue is applied to an extensive system of streets, roads, and highways, all of which exist off of Indian country. As the district court found:

> [T]he tribe does not construct or maintain roads and highways for the use of the general public in Oklahoma. The State of Oklahoma constructs and maintains 111,412.76 miles of streets, roads and highways in Oklahoma which is funded by the state tax on motor fuel. All of the road mileage maintained by the State is off Indian Country. Therefore, the gasoline tax used to maintain these roads is directed at off-reservation value where the taxpayer is receiving State services, whether the taxpayer is a Tribal member or not. Slip Op. at 37a.[12]

The State's ability to raise revenue for highway construction and road maintenance would be in serious jeopardy if tax exempt Indian retailers gain market share at the expense of existing marketers. Yet, such a market share gain is inevitable if

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[11] See Okla. Stat. tit. 68, §§502, 502.1, 502.2, 502.3, 502.4, 502., 506.2, 502.7, 520, 522 and 522.1.

[12] The decision of the United States District Court for the Eastern District of Oklahoma, which has not been reported, is attached to the petition for a writ of certiorari of the Oklahoma Tax Commission as an Appendix. The decision will heretofore be cited as "Slip Op. at _____."

the Tenth Circuit's decision is allowed to stand. The cost advantages inherent in purchasing motor fuel on a tax exempt basis would provide Tribal enterprises with a resale price advantage with which no one could compete. In an industry characterized by intense price rivalry, the difference of a penny or two (not to mention a difference in the magnitude of Oklahoma's seventeen cent motor fuel tax) could be the margin of difference between those marketers that perish and those that survive.

For example, in 1993, the entire price differential between the Nation's refiners' selling price of gasoline to resellers and the price consumers paid for that gasoline averaged only 14 cents per gallon.[13] Thus, on average, wholesalers and retailers *share* a margin of something on the order of 14 cents. Even if competing wholesalers and retailers sold their product at cost, they could not compete with Tribal enterprises that enjoyed a price advantage in the amount of the per gallon motor fuel tax. Such a substantial price advantage would guarantee Tribal enterprises an ever expanding share of the market.

Nor can the State of Oklahoma avoid such a result by moving the incidence of motor fuel taxation up the chain of distribution to the distributor, terminal operator or refiner level. If the Oklahoma legislature were to shift the legal incidence of the tax, for example, to the distributor, Tribal enterprises could operate as effectively at the distributor level as they do now as retailers. Indeed, judging by their success in the development and operation of casinos, the ability of Tribal enterprises to attract

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[13] The U.S. Energy Information Administration reports "Sales For Resale" of gasoline in 1993 averaging 62.5 cents a gallon and sales "Through Company Outlets" averaging 76.5 cents a gallon. U.S. ENERGY INFORMATION ADMINISTRATION, PETROLEUM MARKETING MONTHLY, TABLE 13 (March 1994).

large amounts of capital to operate as refiners cannot be underestimated.[14] With a tax free license, Tribal enterprises are capable of devastating their competition at every level of the distribution chain.

To the extent that petroleum marketers are displaced in the distribution scheme by non-tax paying Indian enterprises, the ability of the State to raise revenue through motor fuel excise taxes would be severely diminished. Thus, the State could be required to revert to a property tax levy to fund highway construction and road maintenance, a system that was abandoned by the states in the early part of this century.[15] The State may also be required to rely on appropriations from general revenues. Whatever the outcome, however, the State of Oklahoma stands to lose a significant source of revenue for purposes that are essential to its economic and general well-being.

Moreover, the court of appeals' decision has important potential ramifications for other states that generate revenue through motor fuel taxation, as well as for the federal government. The amount of revenue generated in 1992 by the 32 states in which the U.S. Bureau of Indian Affairs reports "Tribal

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[14] *See, e.g., Iacocca's Latest Pitch: An Indian-Run Casino In Forests of Oregon*, Wall St. J., Feb. 14, 1995 at 1. *See also, N.Y. Indian Reservations to Produce Tax-Free Gasoline*, U.S. Oil Week, Jan. 16, 1995 at 5.

[15] The motor fuel tax was first imposed by the State of Oregon in 1919. *City of Portland v. Kozor*, 217 P. 833, 108 Or. 375 (1923); *see also, Americas Highways*, p. 114. The motor fuel tax shifted the fiscal burden of support of public roads from the real property owner to the user of the service. By 1929, 26.5 million motor vehicles generated $763.4 million in road user taxes which represented 99 percent of actual state expenditures on highways. *Americas Highways*, p. 115.

land"[16] was in excess of $15 billion annually,[17] representing over sixty-four percent of all of the state motor fuel tax revenues generated nationwide.[18] In 1992, the federal government raised almost $15 billion from motor fuel taxation and it raises considerably more now as a result of a subsequent tax increase.[19] In short, motor fuel taxation is a significant source of revenue at both the state and federal levels, and it is essential to the future development and maintenance of the Nation's highway system. If Indian enterprises operating at different levels of the chain of petroleum distribution are capable of establishing a tax free industry, additional funding from other sources will be necessary to maintain current levels of road and highway support.

B. The Impact Of Motor Fuel Taxation On The Tribe Is Non-Existent

Oklahoma imposes motor fuel taxes on gasoline and diesel fuel sold, stored and distributed, or withdrawn from storage for sale or use within the State. Okla. Stat. tit. 68, §§502, 502.1, 502.2, 502.3, 502.4, 502.5. All of the administrative burdens associated with the tax are allocated to distributors, and not to

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[16] BUREAU OF INDIAN AFFAIRS, DIVISION OF TRUST RESPONSIBILITIES, U.S. DEPT. OF INTERIOR, ACREAGES OF INDIAN LANDS BY AREA AND STATE 3 (1990).

[17] FEDERAL HIGHWAY ADMINISTRATION, U.S. DEPT. OF TRANSPORTATION, HIGHWAY STATISTICS 83 (1992).

[18] *Id.*

[19] In 1993, the federal government raised the per gallon amount of gasoline tax from 14.1 cents to 18.4 cents. The federal tax on diesel fuel went from 20.1 cents per gallon to 24.4 cents per gallon. 26 U.S.C. §4081(a)(2) (Supp. 1994).

retailers such as the Chickasaws. The economic burdens, moreover, fall on consumers. And because the State exempts from taxation fuel purchased by the Chickasaws for use in tribally owned vehicles,[20] the imposition of the tax has no impact whatsoever on the Tribe.

In *Moe* and *Milhelm Attea*, this Court had occasion to consider the administrative burdens associated with state regulation and taxation, and to determine whether administrative burdens imposed on tribal enterprises in aid of state taxation interfere with Tribal self-government. In *Milhelm Attea*, for example, the Court held that "tribal sovereignty does not completely preclude states from enlisting tribal retailers to assist enforcement of valid state taxes..." *Id.* 114 S. Ct. at 2036. In Oklahoma, however, the Tribe is not called upon to bear any administrative burden. Motor fuel taxes are collected and remitted to the State at the distributor level, Okla. Stat. tit. 68, §505, and it is the distributor that is required to make monthly reports indicating the amount of fuel received and sold. *Id.* §505(B)-(C).

Although the statute goes on to provide that "[m]otor fuel taxes [are] remitted by a distributor *on behalf of a licensed retailer*," *id.* §505(C), the statute contains no sanction for retailers who fail to remit the tax to the distributor.[21] Notwithstanding the court of appeals' finding that retailers bear the legal incidence of taxation, they have no legal responsibility for collection or remittance, nor any liability for failure to pay. The administrative

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[20] The tax exemption for tribally owned vehicles was noted by the court of appeals. 31 F.3d at 971.

[21] Taxes that are subsequently determined to be uncollectible by the distributor may be credited against subsequent motor fuel tax liability imposed by law upon the distributor. *Id.* §505(C).

burdens normally associated with the legal incidence of taxation, therefore, are non-existent here.[22]

Nor does the Tribe bear any of the economic burdens of the motor fuel tax. The party responsible for remitting motor fuel taxes to a federal or state taxing authority routinely passes the tax along to the purchaser at the next level of distribution as part of the purchase price. *See, e.g., Gurley v. Rhoden*, 421 U.S. at 206. ("the economic burden of taxes is traditionally passed on to the purchasers-consumer in the form of increased pump prices...")

At the federal level, for example, refiners and, in some cases, terminal operators and other position holders, are responsible for remitting federal excise taxes to the Internal Revenue Service.[23] The full amount of the tax, however, is

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[22] Given the lack of any nexus between retailers and anything associated with the tax, it is more than likely that the court of appeals erred in determining where the legal incidence lies. The Oklahoma statute imposes the tax on the removal of motor fuel from storage for sale or use. Such removal occurs at a time when title to the product resides with the distributor and prior to the distributor's sale to a retailer. The transaction that is subject to taxation, therefore, is undertaken exclusively by the distributor, indicating that the legal incidence of the tax lies there. *See, e.g., Gurley v. Rhoden*, 421 U.S. at 205. This conclusion is also derived from the fact that no sanction lies in the distributor's vendee (that is, the retailer) for failure to remit the tax. *See, id.* ("persuasive also that such was Congress' purpose is the fact that, if the producer does not pay the tax, the Government cannot collect it from his vendees").

[23] The federal government imposes an excise tax on gasoline and diesel fuel. 26 U.S.C. §4081 (Supp. 1994). The tax is imposed on:

> (a)(1)(A)(i) the removal of a taxable fuel from any refinery;
> (ii) the removal of a taxable fuel from any terminal.

(continued...)

recouped in sales to distributors and retailers. In fact, refiner invoices routinely contain a separate line item showing the per gallon amount of the motor fuel tax. Likewise, distributors that purchase from refiners pass along the full amount of the tax, shown as a separate line item on invoices, to their retailer customers. Retailers then recoup the full amount of the tax in their sales to motorists.

While there is no formal requirement that the tax be included in the distributor's price to a retailer, or a refiner's wholesale price to its customers, common sense dictates that refiners and distributors are unwilling and, given market realties, unable to absorb the tax; they pass it along to their customers.[24] As the district court noted, "[t]he retailers wholesale price will include the motor fuel taxes which are in turn included in the retail price at the pump." Slip. Op. at 35a.

Thus, the administrative and economic burdens of Oklahoma's motor fuel tax are not borne at the retailer level. Nor are they borne by the Tribe or its members when they purchase motor fuel for use in Tribal vehicles. In short, the impact of Oklahoma's motor fuel taxes on the Chickasaw Nation is non-existent.

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[23](...continued)
The only exemption from this imposition of tax is for "bulk transfers to registered terminals or refineries." 26 U.S.C. §4081(a)(1)(B) (Supp. 1994).

[24] Indeed, the per gallon amount of the tax exceeds the distributor's margin on such sales. See p. 11 *infra*.

C. With No Tribal Interest At Stake, The Compelling Interest Of The State Of Oklahoma In Imposition Of The Tax Should Be Vindicated

For the reasons stated above, the court of appeals erred in holding that "the district court's balancing of the respective tribal and state interests at stake was not relevant to the determination of the propriety of the fuel taxes." 31 F.3d at 972. Its rigid and mechanical application of rules not meant for application in the circumstances presented here has created an anomalous and dangerous precedent. It effectively invalidates a system of funding highway construction and maintenance that has existed for decades. It does so, moreover, on the basis of a rote application of a legal incidence analysis, without any consideration of the effects or consequences of the tax. Where, as here, the Tribe suffers none of the consequences of motor fuel taxation, the court of appeals' focus on formalism "merely obscures the question whether the tax produces a forbidden effect." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 288 (1977).

Given the compelling interest of the State of Oklahoma in imposition of the tax, and the absence of any impact on Tribal self-government, the traditional balancing of interests should come down squarely on the side of the State. The State's interest clearly outweighs "the tribe's modest interest in offering a tax exemption to customers who would ordinarily shop elsewhere." *Milhelm Attea*, 114 S. Ct. at 2035. The consequences of tax free motor fuel retailing cannot be justified on the basis of Tribal sovereignty when the only discernable impact on the Tribe is a license to market motor fuel on a tax free basis.

CONCLUSION

On the basis of the foregoing, the decision of the Tenth Circuit Court of Appeals in this case should be reversed.

RESPECTFULLY SUBMITTED,

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California Independent Oil Marketers Association
Colorado Petroleum Marketers Association
Empire State Petroleum Association
Florida Petroleum Marketers Association
Fuel Merchants Association of New Jersey
Georgia Oilmen's Association
Idaho Oil Marketers Association
Illinois Petroleum Marketers Association
Independent Connecticut Petroleum Association
Independent Oil Marketers Association of New England
Indiana Oil Marketers Association, Inc.
Kansas Oil Marketers Association
Kentucky Petroleum Marketers Association
Louisiana Oil Marketers Association
Maine Oil Dealers Association
Michigan Petroleum Association
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Missouri Petroleum Marketers Association
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Nebraska Petroleum Marketers, Inc.
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New England Fuel Institute
New Mexico Petroleum Marketers Association
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Tennessee Oil Marketers Association
Utah/Western Petroleum Marketers Association
Virginia Petroleum Jobbers Association
Washington Oil Marketers Association
West Virginia Petroleum Marketers Association
Wyoming Petroleum Marketers Association

(9)

No. 94-771

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In The

Supreme Court of the United States

October Term, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF STATES OF SOUTH DAKOTA, CALIFORNIA, LOUISIANA, MISSISSIPPI, MONTANA, NEVADA, NORTH DAKOTA, OREGON, UTAH, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER, OKLAHOMA TAX COMMISSION

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The State of South Dakota, and the other amici states, through their respective Attorneys General, respectfully submit a Brief Amicus Curiae pursuant to Supreme Court Rule 37.5 in support of the Petitioner.

INTEREST OF AMICI

The amici States have a compelling interest in the clarity and proper application of Indian law principles affecting their authority to impose taxes as to Indian Country transactions or on tribal members with respect to legal relationships established outside Indian Country. Lack of clarity in the principles themselves or their misapplication by lower courts inevitably lead to time- and resource-consuming litigation, as reflected in the Court's recent decisions involving the Petitioner. *Oklahoma Tax Comm'n v. Sac and Fox Nation,* 113 S. Ct. 1985 (1993); *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe,* 498 U.S. 505 (1991).

This matter presents another opportunity for the Court to reaffirm two core rules with respect to the taxation of tribes and tribal members within and without Indian Country – rules which are mirror images of one another. Within Indian Country set aside for a particular tribe, it and its members may not be forced to bear the legal incidence of a state tax absent clearly-expressed congressional authorization. Outside Indian Country, however, tribes and their members are subject to otherwise nondiscriminatory state taxes unless Congress explicitly has immunized them from such taxation. While one or both of these formulations may be criticized by the

parties here as wooden, they nonetheless provide a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority.

SUMMARY OF THE ARGUMENT

Two bedrock Indian law preemption principles control disposition of the questions presented in this matter. First, "[i]n the special area of state taxation," congressional consent is necessary before the legal incidence of a tax may be imposed on a tribe or its members as to transactions occurring on Indian Country set aside for their benefit. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987); *accord Dept. of Tax. & Fin. v. Milhelm Attea & Bros.*, 114 S. Ct. 2028, 2035 (1994); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 113 S. Ct. 1985, 1991 (1993); *County of Yakima v. Yakima Indian Nation*, 112 S. Ct. 683, 688 (1992); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989); *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 162-164 (1980); *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-81 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171 (1973). Second, once tribes or tribal members leave Indian Country, they are "subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973); *accord Sac and Fox Nation*, 113 S. Ct. at 1991; *Oregon Dep't of Fish & Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 765 n.16

(1985). These principles, like many general rules, often are more easily stated than applied, but here their application is relatively straightforward.

Although the parties dispute where the legal incidence of Oklahoma motor fuel taxes lies, it is undisputed that, however that issue is decided, the Respondent or its members, either as the retailer or the ultimate consumer, will shoulder the legal incidence for any fuel that they purchase. Whether the Petitioner's or the Respondent's position concerning the taxes' incidence is accepted has obvious practical importance to them since that determination affects the extent to which the taxes can be challenged, but, from the amici States' standpoint, the more critical question is whether the Hayden-Cartwright Act, 4 U.S.C. § 104, provides the requisite authority to tax Indian Country motor fuel purchases by the Tribe or its members. The statute so indicates when read literally, and that literal reading is not only consistent with relevant legislative history but also with contemporaneous administrative interpretation by the Attorney General and the Department of Interior. Regardless of how it resolves the tax incidence issue, the Court should remand this matter for consideration whether Oklahoma may rely on the Hayden-Cartwright Act and, if so, whether it applies.

The Court of Appeals erred in concluding that Oklahoma lacks authority to tax the Respondent's members residing outside Indian Country with respect to income earned from tribal employment within Indian Country. The court's reliance on the 1830 Treaty of Dancing Rabbit Creek is insupportable because, at most, that treaty preserved the Respondent's jurisdictional primacy merely as

to its own territory and does not constitute the requisite express congressional exemption from obligations otherwise imposed under state law by virtue of non-Indian Country transactions – here the act of Chickasaw Nation members establishing residency off tribal lands. Although the Respondent has not relied on the second prong of the preemption test articulated in *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142-43 (1980) – interference with tribal self-governance – to except those members from the state income tax, there would be no credible basis for that contention even if it were raised.

ARGUMENT

I.A. This Court Should Vacate The Judgment Of The Tenth Circuit Court And Remand With Instructions To Determine The Applicability Of The Hayden-Cartwright Act.

The Tenth Circuit Court acknowledged the existence of the Hayden-Cartwright Act and, apparently, considered the possibility that Hayden-Cartwright might be dispositive. The court however avoided application of Hayden-Cartwright, pointing out that Oklahoma had not raised the issue.[1] This Court has never determined the applicability of the Hayden-Cartwright Act to sales of motor fuel to Indians within Indian reservations. It has, however, indicated interest in the question on two occasions.

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[1] *Chickasaw Nation v. Oklahoma,* 31 F.3d 964, 972 (10th Cir. 1994).

The first was *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980). In *White Mountain*, the tribe and its non-Indian logging company challenged an Arizona motor fuel tax under facts carefully tailored to avoid the application of the Hayden-Cartwright Act. The logging company kept detailed mileage records of state-maintained highway use within the reservation. The logging company paid (and the tribe reimbursed the company) without protest that portion of the challenged motor fuel tax attributable to the logging company's operation on state-maintained reservation roads. Such payment (and tribal reimbursement) implicitly acknowledged the tribe's obligation to pay those state motor fuel taxes attributable to use of state-maintained highways within the reservation.

The second occasion was *Herzog Brothers Trucking, Inc. v. State Tax Commission*, 69 N.Y.2d 536, 508 N.E.2d 914 (1987) (finding regulations preempted by federal law), vacated and remanded, 487 U.S. 1212 (1988), on remand 72 N.Y.2d 720, 533 N.E.2d 255 (1988). In *Herzog Brothers*, a motor fuel wholesaler challenged New York's imposition of state motor fuel taxes upon him because all of his sales were to Indian retailers on a reservation. The Court, at the suggestion of the United States Solicitor General, vacated the judgment and remanded the case to the Court of Appeals of New York for reconsideration in light of proposed regulations adopted by the state tax commission. In both *White Mountain* and *Herzog Brothers*, the Solicitor General filed amicus briefs. In each instance he acknowledged the presence of a close question on the applicability of Hayden-Cartwright. In each instance the Solicitor General cited a 1940 opinion of the Interior

Solicitor, who, relying on the Hayden-Cartwright Act, held that the Wisconsin state motor fuel tax must be imposed on all sales of motor fuels to Indians and non-Indians alike on the Menominee Indian Reservation. In each instance he acknowledged the potential applicability of the 1940 Solicitor opinion.[2] In *White Mountain,* he suggested that Hayden-Cartwright not be considered because the logging company and the tribe had paid the tax attributable to the use of the state-maintained reservation roads.[3] In *Herzog Brothers,* the Solicitor General squarely suggested that the case be remanded for consideration of the state law change and also the applicability of the Hayden-Cartwright Act. He wrote:

> A remand to the court of appeals also would allow that court to consider the extent, if any, to which the Hayden-Cartwright Act applies to sales of motor fuel to Indians or non-Indians on

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[2] 57 I.D. 129, 139 (1940); Felix Cohen agreed with the Department of Interior's administrative ruling in his seminal treatise, as did the subsequent revisions of that treatise. F. Cohen, "Handbook of Federal Indian Law" 264 (1942); U.S. Department of Interior, "Federal Indian Law" 870 (1958); F. Cohen, "Handbook of Federal Indian Law" 411-12 (1982).

[3] The Solicitor General's brief suggested that because the tribe, the Bureau of Indian Affairs or the logging company had borne the road maintenance and construction costs in question, the Hayden-Cartwright Act did not apply. Brief for the United States as Amicus Curiae at 15; *White Mountain Apache Tribe v. Bracker,* United States Supreme Court, 448 U.S. 136 (1981) (No. 78-1177). No such factual distinction exists in this case. Oklahoma contains over 1,099,301 acres of trust land. That state has 112,000 miles of rods maintained within its borders, including trust land. Not a single mile is maintained by the BIA. U.S. Dept. of Transportation, *County Road Mileage* at III 65-6 (1992).

> Indian reservations. The court of appeals did not address the possible application of that act in the decision under review.[4]

We agree. It should be done now on remand because as the Solicitor General has recognized and as developed below, very substantial grounds exist to conclude that the Hayden-Cartwright Act provides the Congressional consent to impose Oklahoma's fuel taxes on the Respondent or its members.[5]

I.B. The Plain Language Of The Hayden-Cartwright Act And Contemporaneous Interpretations Should Control And Be Dispositive Regardless Of The Outcome Of The Legal Incidence Question.

It is often argued that this Court has adopted a per se rule regarding imposition of state taxes in Indian Country. "In the special area of state taxation of Indian tribes and tribal members, we have adopted a per se rule." *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 215 n.17 (1987); *see also County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation,* 112 S. Ct. 683

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[4] Brief for the United States as Amicus Curiae at 16 n.10; *State Tax Commission of New York v. Herzog Bros. Trucking, Inc.,* No. 87-382.

[5] The New York Court of Appeals refused to consider Hayden-Cartwright on remand, (*Herzog,* 533 N.E.2d 255, 258) and adhered to its now rejected view that New York's motor fuel tax regulations were preempted by the federal trader statutes. *See Milhelm Attea,* 114 S. Ct. 2028, 2031 n.2 (linking New York's cigarette and motor fuel tax regulations) overruling the federal trader statute preemption analysis.

(1992).[6] " 'Absent cession of jurisdiction or other federal statutes permitting it,' we have held, a state is without power to tax reservation lands and reservation Indians." *Id.* at 688.

The taxes at issue in the first question herein are motor fuel taxes. Amici States believe Oklahoma may impose motor fuel taxes on sales to all persons within Indian Country because a federal statute authorizes the tax.

> § 104. Tax on motor fuel sold on military or other reservation[;] reports to State taxing authority
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> (a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of

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[6] The Ninth Circuit relied on the fundamental principles set forth in *Yakima*, and correctly so, to squarely reject an argument that would have narrowly confined *Yakima* to its facts. *Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355 (9th Cir. 1993), *cert. denied*, 114 S.Ct. 2727 (994). This same argument, with the support of the United States, has recently been renewed and is now pending in the Tenth Circuit. *Southern Ute Indian Tribe v. Board of County Com'rs. County of La Plata, et al.*, 855 F.Supp. 1194 (D. Colo. 1994) *appeal docketed*, No. 94-1310 (10th Cir. July 8, 1994.

> Columbia, within whose borders the reservation affected may be located.
>
> (b) The officer in charge of such reservation shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory, or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel with respect to which taxes are payable under subsection (a) for the preceding month.
>
> (c) As used in this section, the term "Territory" shall include Guam.

Public Law 74-686, § 10, 49 Stat. 1519, 1521-22 (1936) (codified as amended at 4 U.S.C. § 104). The Hayden-Cartwright Act, 4 U.S.C. § 104, is specific congressional authorization for states to impose motor fuel taxes with respect to all fuels sold within Indian reservations unless that fuel is destined for "the exclusive use of the United States."

A crucial term in the Hayden-Cartwright Act is "licensed traders." Congress has, pursuant to its plenary power to regulate commerce with the Indian tribes, required Indian traders to obtain licenses since 1790. This Court thus has observed that the United States

> has promulgated detailed regulations prescribing in the most minute fashion who may qualify to be a trader and how he shall be licensed; penalties for acting as a trader without a license; conditions under which government employees may trade with Indians; articles that cannot be sold to Indians; and conduct forbidden on a *licensed trader's* premises.

Warren Trading Post v. Arizona Tax Comm'n, 380 U.S. 685, 689 (1965) (emphasis added). By 1936, the term "licensed traders" had been connected with United States Indian affairs for 146 years. It is little wonder that the Interior Solicitor concluded in 1940 that "the reference to *'licensed traders'* is particularly suggestive of Indian reservations."[7]

Further, the term "licensed traders" was understood by Congress to be Indian traders during debate on the Buck Act in 1940. Congressman Buck reported on April 23, 1940, that he had personally experienced "licensed trader" problems:

> We had some bad situations with regard to these *licensed traders.* There are *licensed traders* on certain reservations, for instance, at Palm Springs, Calif., you have your reservation line right down the street, and on one side of the street you have merchants who are paying sales taxes, and on the other side you have *licensed traders* who are not paying any sales tax on identically the same types of goods.[8]

Finally, "licensed traders" appears in the United States Code only in the Hayden-Cartwright Act. That term also appears in the Code of Federal Regulations only in Title 25.

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[7] 57 I.D. 129, 139 (1940)

[8] Hearing on H.R. No. 6687, before a Subcommittee of the Senate Committee on Finance, 76th Cong., 3d Sess. 2 (Apr. 23, 1940) (emphasis added). The Agua Caliente Indian Reservation exists on the checkerboard pattern in the area of Palm Springs, California. This court may take judicial notice of the geographic fact that the only federal reservation in the vicinity of Palm Springs, California is the Agua Caliente Indian Reservation. *Agua Caliente Band of Mission Indians v. County of Riverside*, 306 F. Supp. 279, 281 (C.D. Cal 1969).

The boundaries of the additional key term "other reservations," were considered by the Attorney General in 1936, four months after the Act's adoption. He looked to the decisions of this Court for guidance and adopted the definition below:

> The word is used in the land law to describe any body of land, large or small, which Congress has reserved from sale for any purpose. It may be a military reservation, *or an Indian reservation*, or, indeed, one for any purpose for which Congress has authority to provide.

38 Opinions of Attorney General 522, 524 (1936). (Citing *United States v. Celestine*, 215 U.S. 278, 285 (1909)) (Emphasis supplied). This Court has also recently taken a broad view of the phrase "reservation." *Sac and Fox Nation v. Oklahoma Tax Comm'n*, 113 S. Ct. 1985 (1993).

Moreover, Senator Hayden, who served on the conference committee which authored the Hayden-Cartwright Act, previously served in the House of Representatives. In 1921, he advocated use of the phrase *"reservations under federal control"* specifically to allow Indian lands to be treated as "unappropriated public lands" and thereby increase federal matching funds for the federal highway aid program. The history shows that Senator Hayden understood that "federal reservations" included Indian reservations.[9]

It is therefore significant that Congress revisited the Hayden-Cartwright Act on three occasions after the issuance of the Attorney General Opinion and twice after the Interior Solicitor opinion, but did not change or amend

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[9] *See* extended discussion *infra* at pages 13 to 15.

the basic act. The first amendment was the Buck Act, 54 Stat. 1059, 1060 (1940) (codified at 4 U.S.C. 105 et seq.) This law subjected all persons in "federal areas" except for "any Indian not otherwise taxed" to state sales, use, and income taxes. Section 7 of the Buck Act expanded the types of motor fuel taxes subject to the Hayden-Cartwright Act. Congress explicitly excepted Indians from the provisions of the Buck Act but did not disturb the broad application of Hayden-Cartwright to Indian reservations. Congress then reenacted the Hayden-Cartwright Act without change in 1947 (61 Stat. 641, 644) and added a new section extending coverage to Guam in 1956 (70 Stat. 799). Surely if Congress had meant to overturn existing federal authority with regard to reservation sales of motor fuels to Indians, it easily could have done so on each occasion. Congress did not. Congress is presumed to know the administrative interpretation of a statute and to have adopted that interpretation when it reenacts a statute without change. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

The settled rules of statutory construction adopted by this Court should apply in this case and the plain language of 4 U.S.C. § 104 controls. *Negonsott v. Samuels*, 113 S. Ct. 1119, 1122-23 (1993). That plain language removes all impediments to state taxation of motor fuels sold on Indian reservations to any person including the Respondent or its members. This conclusion, however, is also supported by relevant legislative history.

I.C. The Legislative History Preceding And Surrounding The Enactment Of The Hayden-Cartwright Act Compels A Broad Application Of The Statute.

Cases such as *Bryan v. Itasca County*, 426 U.S. 373 (1976) suggest that legislative history of the federal

enactment at issue may be examined on the question of imposition of state taxes within Indian reservations. Historical analysis compels the conclusion that the Hayden-Cartwright Act specifically authorizes Oklahoma's (and all other states) motor fuel taxes to be imposed on all purchasers in Indian Country.

1. Initial Federal Involvement In Highway Financing: The Property Tax Mode

About the turn of this century, a political force known as the "good roads" movement began to impact all levels of government in the United States. The movement advocated local, state and federal funding of quality, all-weather roads for mail delivery and general public access. By 1900 most local and state governments had enacted real property tax levies to support public road projects, but the federal government had little involvement except research. The explosive popularity of the automobile changed all that. In 1900 there were about 8,000 automobiles in the United States. By 1910, motor vehicles multiplied to 468,500 and jumped to 2,491,000 by 1915.[10] Congress was forced to become seriously involved in public road construction.

Initial federal aid for public roads assisted rural mail delivery. The Post Office Department Appropriations Act, 37 Stat. 539, 551 (1912), provided money to improve the condition of selected post roads, and in general, study

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[10] U.S. Department of Transportation, *America's Highways, 1776-1976*, "A History of the Federal Aid Program," p. 67 (1976) (hereafter "America's Highways").

whether improvement of the roads could improve rural mail delivery service. On July 11, 1916, Congress passed "An Act to Provide that the United States shall aid the states in the construction of rural post roads, and for other purposes." 39 Stat. 355. This first federal aid highway bill focused on rural post roads and forged a public highway partnership between states and the federal government. The 1916 enactment provided:

1. That the United States would fund construction of approved rural post roads for one-half of the actual cost up to $10,000 per mile. 39 Stat. 355, 358.
2. States would (at their own expense) properly maintain federally funded roads.
3. States would both construct and maintain most roads on public lands. (The 1916 bill authorized roads only on national forest lands.)
4. All roads constructed with federal aid funds would be available for free public use. 39 Stat. 355, 356.

The 1916 bill fixed an apportionment formula for fund distribution to states; one-third was distributed on state population, one-third on land area, and one-third on rural mail delivery route mileage. 39 Stat. 355, 357.

This formula was flawed, however, because in 1916 states used property taxes to generate the monies necessary to participate in the highway program. Many Western states contained massive federal lands, including national parks, national forests, military reservations, and Indian reservations. Public roads were needed on these lands. However, they produced no tax revenue to support

public roads.[11] Congress addressed, in part, the problem in 1921, by amending the one-third formula to account for public lands.[12] Any state containing over five percent of "unappropriated public land" received increased federal highway funds.[13] This formula modification was inadequate according to Representative Hayden and others because, as Representative Robsion said:

> Many of the states have not only used state revenues to aid in the building of public roads in the states on public lands, but they have gone further, namely, through Indian reservations.

61 Cong. Rec. 7123. Representative Hayden recognized the reality that Indian reservations created state tax revenue problems identical to other public lands. He thus attempted to amend the 1921 bill to include "reservations under federal control" with "unappropriated public lands" in the formula for federal matching funds. During floor debate, he stated:

> It has been said in another body that there is no authority of law for the expenditure of federal aid road funds on roads within Indian reservations, but whoever it was that made that assertion evidently had not looked at the law. The Federal aid act as amended now provides that –

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[11] Philip H. Burch, Jr., *Highway Revenues and Expenditure Policy in the United States*, 218 (1962) (hereafter Burch).

[12] 42 Stat. 212, 214 (1921). *See also* 61 Cong. Rec. 1468-69 (1921) (Statement of Senator Pitman); *see also* Senate Committee on Post Offices and Post Roads, Report No. 40, May 9, 1921.

[13] *Ibid.* See also, Burch at p. 218.

> The Secretary of Agriculture is authorized to cooperate with the States, through their respective State highway departments, in the construction * * * any public road a major portion of which is now used or can be used, * * * for the transportation of the United States mails.
>
> A public road is a way for passage or travel that is open to use by all persons without discrimination. The roads on all Indian reservations are freely used by anyone who desires to travel thereon, and the United States mails are regularly transported on them. *The Indian reservation roads, therefore, as fully and completely comply with every requirement of the law as any other roads in the United States that have received that benefit of Federal aid.*

61 Cong. Rec. at 7134 (emphasis added). Because Arizona used state and federal aid money to build roads within Indian reservations in Arizona, he additionally pointed out there was no reason why untaxed Indian lands should be treated differently than "unappropriated public lands":

> The Senate has recognized that the western states are entitled to pay less share of road construction in proportion to the area of unappropriated public lands within their borders. The only reason for granting this recognition is that the public lands cannot be taxed. But the title to every acre within an Indian reservation, a national forest, a national park, or a military reservation is also in the United States and for that sole cause is not subject to state taxation. Since the exemption of the public lands from any form of taxation by the states is the only basis for the action taken by the Senate, I cannot

> see by what logic that body could fail to agree with the House that all other untaxed lands in "reservations under federal control" should likewise be taken into consideration in determining the share to be advanced by the western states for road construction under the federal aid plan.

61 Cong. Rec. at 7135. Representative Hayden did not carry the day in 1921, but his sound reasoning eventually would.

The inequity perceived by Representative Hayden was remedied in 1925. The proponent of the amendment was Representative Hastings of Oklahoma. He stated:

> We in Oklahoma have a large amount of Indian lands. In the eastern part of the state alone there were 19,500,000 acres. Some of these lands have been made taxable. All have been allotted, but a great part of them remain nontaxable. This is true with reference to lands allotted to Indian tribes in western Oklahoma.
>
> The chief of the Bureau of Public Roads endorsed this provision[14] and recognized that it was fair to place nontaxable Indian lands in the same class with unappropriated public lands.

65 Cong. Rec. 10718 (1924). The 1925 Federal Highway Act was amended to accomplish that objective by inserting the words "and nontaxable Indian lands, individual

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[14] The "provision" Representative Hastings references is H.R. 8885 which would have placed "non-taxable Indian lands, individual and tribal" in the same class with unappropriated public lands. *See* 65 Cong. Rec. 10718 (1924).

and tribal" in every location after the words "unappropriated public lands." 43 Stat. 889, 890 (1925).

2. The Hayden-Cartwright Act: Congressional Recognition Of The Motor Fuel Tax As The Principal Component Of Highway Financing

Even as Congress was adjusting its funding mechanism to reflect the States' traditional reliance on property taxes to finance road construction and maintenance, a sea change in that financing method was occurring. The motor fuel tax was first imposed by Oregon in 1919.[15] The motor fuel tax shifted the fiscal burden of support of public roads from the real property owner to the user of the service. By 1929, 26.5 million motor vehicles generated 763.4 million dollars in road user taxes which represented 99 percent of actual state expenditures on highways.[16]

The federal aid highway program funded by state and federal motor fuel taxes,[17] became a major tool to create public works during the Great Depression. Congress more than tripled highway aid appropriations.[18]

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[15] *City of Portland v. Kozer*, 217 P. 833, 108 Or. 375 (1923); *See also, America's Highways*, p. 114.

[16] *America's Highways*, p. 115

[17] During the Depression, tax revenues from income and property taxes became almost non-existent. Gas tax revenues were, however, stable. As a result, the federal government designed much of their economic recovery policy around road construction. *America's Highways*, p. 123-4.

[18] Federal aid highway appropriations in 1921 and 1927 were $75,000,000; 42 Stat. 212, 216; 43 Stat. 889; and by 1933, $400,000,000; 48 Stat. 195, 203.

The federal government continued to expand the presence of state highway departments within Indian reservations. The National Industrial Recovery Act of 1933, appropriated 400 million dollars for the emergency construction of public highways and related projects by state highway departments and earmarked 50 million dollars for *Indian reservations,* and other public lands.[19] Congress appropriated another 200 million dollars in 1934[20] to be expended by state highway departments under the Federal Aid Road Act. Separate appropriations of 24 million and 2.5 million dollars were made for *state highway projects* on *Indian reservations,* and public lands.[21]

In 1934, Congress also addressed another problem; namely, many States were diverting motor fuel tax collections to purposes other than road construction and maintenance. Diversion was detrimental to economic recovery.[22] Consequently, Congress acted to discourage diversion of motor fuel tax revenues by the states.

> Since it is unfair and unjust to tax motor vehicle transportation unless the proceeds of such taxation are applied to the construction, improvement, or maintenance of highways, after June 30, 1935, federal aid for highway construction

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[19] 48 Stat. 195, 204 (1933).

[20] Pub. L. 73-393, 48 Stat. 993 (1934)

[21] The same bill appropriated four million dollars for each of two fiscal years for the construction and improvement of Indian reservation roads which were not eligible for federal highway aid. 48 Stat. 993, 995, § 8.

[22] A dollar spent on direct relief supported less people than a highway construction dollar, which kept eight people employed. *America's Highways,* p. 124.

> shall be extended only to those states that use at least the amounts now provided by law for such purposes in each state from state motor vehicle registration fees, licenses, gasoline taxes, and other special taxes on motor vehicle owners and operators of all kinds for the construction, improvement, and maintenance of highways and administrative expenses in connection therewith, including the retirement of bonds for the payment of which such revenues have been pledged, and for no other purposes, under such regulations as the Secretary of Agriculture shall promulgate from time to time.

48 Stat. 993, 995. The States responded with a series of constitutional amendments or statutes earmarking gas tax revenues substantially as suggested by the federal government. By 1942, fourteen States had constitutional amendments.[23]

The transition from property taxes to motor fuel taxes as a funding source for public highways did not lessen the need of western states for favored highway funding by Congress. These states were still handicapped because of "public lands and Indian reservations", but in a different way.

"Public lands" inhibited state gas tax revenues in two ways. First, "public lands" usually equate with sparsity of population. Much "public land" is not inhabited. States with large amounts of public land, and therefore large commitments to build roads but small populations, were

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[23] *Ibid.*

still entitled to the enhanced federal highway aid.[24] Second, those "public lands" which *were* populated (i.e. military and Indian reservations) presented the second impediment to collection of state gas tax revenues. Filling stations on *occupied public lands* were selling gas *free* of the *state motor fuel tax*. In *Standard Oil Co. v. California*, 291 U.S. 242 (1934), this Court held that California's state motor fuel tax could not be imposed on gasoline sold at the Presidio, a military reservation in San Francisco. As a result, motorists could purchase Presidio gasoline state-tax free and for consumption on state-maintained public highways.

Predictably, state highway officials complained to their Congressmen and Senators.[25] Bills were introduced allowing States to collect their motor fuel taxes within federal areas. *See* 78 Cong. Rec. 8930 (1934) H.R. 9641; *see also* 79 Cong. Rec. 366 (1935) H.R. 3660. The eventual Congressional response was the federal aid highway appropriations bill, to which now Senator Hayden moved an amendment:

> That all taxes levied by any state upon sales of gasoline and other motor vehicle fuels may be levied, in the same manner and to the same extent, upon such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, or other similar agencies, located on the United States military or other reservations, when such fuels are used for other than governmental purposes. Such taxes, so levied,

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[24] *Burch*, p. 218.

[25] *See* 79 Cong. Rec. 4083 (1935) and 80 Cong. Rec. 6913 (1936).

> shall be paid to the proper taxing authorities of the state within whose borders the reservation affected may be located.

80 Cong. Rec. 6913 (1936). He simultaneously presented a resolution of the Western Association of State Highway Officials in support of his amendment which read in part:

> Whereas this conference views with alarm the continued sale of motor vehicle fuels on government military and other reservations, upon which no state tax has been collected, such tax free fuel being used on the public highways.

Id. The amendment was adopted by the Senate. The bill went to conference committee composed of Senators McKeller, Hayden and Fraser and Representatives Cartwright, Warren, Woodington, Walcott and Terpin. The Conference Committee revised Senator Hayden's amendment as follows:

> That all taxes levied by any state, *territory, or the District of Columbia* upon sales of gasoline and other motor vehicle fuels may be levied, in the same manner and to the same extent, upon such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, *filling stations, licensed traders,* and other similar agencies, located on United States military or other reservations, when such fuels are *not for the exclusive use of the United States.* Such taxes, so levied, shall be paid to the proper taxing authorities of the state, *territory, or the District of Columbia,* within whose borders the reservation affected may be located.

H.R. Rep. No. 2902, 74th Cong., 2d Sess. (1936). This emphasis reflects the language which was expanded or changed from the prior amendment.

The Conference Committee thus made three changes in Section 10:

1. It expanded the class of protected state revenues to include territorial and District of Columbia gas taxes;
2. It expanded the specifically mentioned outlets which must impose state motor fuel taxes to include *filling stations* and *licensed traders;* and
3. It narrowed the class of motor fuels which may be sold free of the state tax from "governmental purposes" to the "exclusive use of the United States."

This amendment became the Hayden-Cartwright Act of 1936.

II. The 1830 Treaty Does Not Provide The Express Exemption From State Taxation Required To Rebut The Presumption That Oklahoma May Tax The Income Of Tribal Members Not Residing In Indian Country Set Aside For The Respondent. Tribal Self-Governance Principles Also Do Not Provide A Basis For Preempting Application Of Oklahoma's Income Tax.

The Court of Appeals found that "[r]esidency is simply not relevant" to its determination that the 1830 Treaty of Dancing Rabbit Creek, 7 Stat. 333, precludes imposition of state income tax on Chickasaw members employed by the Respondent but residing outside Indian

Country in Oklahoma. Petition, App. at 30a. In so concluding, the court failed to apply the proper standard for determining whether Oklahoma has authority to tax those members and misconstrued the treaty itself.

The Court of Appeals' refusal to consider the issue of residency is a replay of the error this Court found in *Sac and Fox Nation v. Oklahoma Tax Commission*, 967 F.2d 1425 (10th Cir. 1992), *rev'd*, 113 S. Ct. 1985 (1993). There, as here, the Tenth Circuit held that residency was irrelevant to its determination that Oklahoma could not lawfully tax the income of tribal members receiving wages from the tribe. This Court vacated the decision, holding that the residence of a tribal member "is a significant component" of the presumption against state tax jurisdiction set out in *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973). *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 113 S. Ct. 1985, 1991 (1993). In remanding the case for further consideration, the Court directed the lower court to first determine residency, noting that "*if the tribal members do live in Indian Country*, our cases require the court to analyze the relevant treaties and federal statutes against the backdrop of Indian sovereignty." *Id.* at 1992 (emphasis added). When the tribal members subject to tax *do not* live in Indian Country, however, there is no presumption against state tax jurisdiction. The opposite presumption governs instead.

The Chickasaw members against whom Oklahoma seeks to enforce its income tax are residents of Oklahoma living outside the territorial boundaries of the Chickasaw Nation. Absent express federal law to the contrary, "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law

otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *accord Sac and Fox Nation*, 113 S. Ct. at 1991 (citing *McClanahan*, 411 U.S. at 176); *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 765 n.16 (1985). The income tax at issue here is uniformly imposed on all Oklahoma residents, excluding tribal members who have chosen to live in the territory set apart for their particular tribe, and the State's authority to do so reflects the long-established principle that "[e]njoyment of the privileges of residence within the State, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government." *Lawrence v. State Tax Comm'n*, 286 U.S. 276, 279 (1932). The Court of Appeals' strained, confusing conversion of the presumption in favor of Oklahoma's authority to impose an income tax on Chickasaw members into some lesser form of evidentiary "burden-shifting" device (Petition, App. 26a-27a) simply, and unjustifiably, departs from settled Indian law principles which, in turn, are rooted in equally settled tax doctrine.

The question thus becomes whether "express federal law" exists upon which to find preemption of Oklahoma's taxing authority. The Court of Appeals looked to Article IV of the 1830 treaty, 7 Stat. 333-34, but that provision clearly has no application here. Read in its entirety, Article IV was a grant of authority to the Choctaw Nation and, by virtue of the 1837 Treaty of Doaksville, 11 Stat. 573, to the Chickasaw Nation with respect to "all the persons and property that may be within their limits west" – i.e., within the "tract of country west of the Mississippi River" granted to those tribes in fee simple

pursuant to Article II of the 1830 treaty. While this land was never to "be embraced in any Territory or State," subsequent legislation proved otherwise. *See generally* Francis Paul Prucha, *The Great Father* 897-92 (1984); Susan Work, *The "Terminated" Five Tribes of Oklahoma: The Effect of Federal Legislation and Administrative Treatment on the Government of the Seminole Nation*, 5 Am. Indian L. Rev. 81 (1978).

Part and parcel of the eventual loss of Indian Country status for much of the initial treaty grant and Oklahoma's admission into the Union was subjecting Chickasaw members to state law with respect to legal relationships, including residency, established outside their Tribe's greatly diminished territory. Crediting the Court of Appeals' construction of Article IV, necessarily would mean that tribal members are exempt from *all* Oklahoma laws with respect to non-Indian Country transactions, since this Court made clear in *Mescalero Apache Tribe* that the general applicability of state law to tribal members "going beyond reservation boundaries" is "as relevant to a State's tax laws" as it is to other laws. 411 U.S. at 148-49; *cf. Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478 (1976) (rejecting contention that section 6 of the General Allotment Act, 25 U.S.C. § 349, authorized imposition of non-real property taxes and observing that, were the contrary position to be accepted, its laws for "*all* jurisdictional purposes – civil and criminal" would apply). The Court of Appeals did not address the plainly implausible implications of its reasoning.

The Court of Appeals also did not address the issue actually left undecided in *Sac and Fox Nation:* "whether

the Tribe's right to self-governance could operate independently of its territorial jurisdiction to pre-empt the State's ability to tax income earned from work performed for the Tribe itself when the employee does not reside in Indian Country." 113 S. Ct. at 1992. The absence of such discussion was not an oversight, since the Respondent has never relied on inherent sovereignty principles as an independent basis for preemption of the state income taxes. Its reluctance to make that assertion is understandable. To hold that the Chickasaw Nation may reach beyond its territorial boundaries to exempt nonresident members from the burden of Oklahoma's income tax would accord the Tribe a *greater* sovereignty than that enjoyed by the States themselves. In relations among the States, one State's sovereignty does not extend into the territory of any other State, but is wholly contained within its own borders. In *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881), an early state tax case, the Court held that Maryland was entitled to impose a tax on New York and Pennsylvania bonds held by a Maryland resident, even though the bonds would be exempt from tax in the issuing state: "One State cannot exempt property from taxation in another. Each State is independent of all the others in this particular."[26] The Court went on to note that

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[26] In a somewhat later holding, the Court refused to enjoin condemnation of real property owned by Georgia in Tennessee, finding that "[l]and acquired by one state in another State is held subject to the laws of the latter and to all the incidents of private ownership. . . . The sovereignty of Georgia was not extended into Tennessee." *Georgia v. Chattanooga*, 264 U.S. 472, 480-481 (1924). The highest courts of at least three States have also held that each State's sovereignty is contained within its territorial borders. *Kansas v. Holcomb*, 116 P. 251 (Kan. 1911)

regardless of the source of the income, "[a]ll the obligations which rest on the holder of the debt as a resident of the State in which he dwells still remain, and as a member of society he must contribute his just share towards supporting the government whose protection he claims and to whose control he has submitted himself." *Id.* at 595. This was the same reasoning underlying the Court's decision in *Lawrence*, which upheld Mississippi's right to tax the income earned by a Mississippi resident on road projects in Tennessee:

> The tax . . . is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received. These are rights and privileges incident to his domicile in the state and to them the economic interest realized by the receipt of income or represented by the power to control it, bears a direct legal relationship.

286 U.S. at 281. No doubt exists, therefore, that, even were the Respondent entitled to status coequal with the States, it could not arrogate to itself the power to insulate

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(Missouri could not claim a Kansas property tax exemption for a Missouri waterworks plant located in Kansas); *Warran County, Louisiana v. Hester*, 54 So. 2d 12 (La. 1951) (Louisiana constitutional provision exempting all public property from taxation did not extend to a Mississippi-owned bridge that extended into Louisiana). *Minnesota v. Hudson*, 42 N.W.2d 546 (Minn. 1950) (the City of Hudson, Wisconsin, could not claim the property tax exemption Minnesota granted to its own municipalities). In each case, the holding was based on the principle that when one State moves beyond its jurisdictional boundaries into another State's territory, "it comes as a private party and brings with it none of the prerogatives of sovereignty." *Holcomb*, 116 P. at 254.

its members from the income tax of another State merely because the income taxed was earned within the Chickasaw Nation's territorial boundaries by virtue of tribal employment.

Historically, Indian tribes within the borders of the United States have been regarded "as having a semi-independent position when they preserved their tribal relations; *not as States, not as nations, not as possessed of the full attributes of sovereignty,* but as a separate people, with the power of regulating their internal and social relations, . . . " *McClanahan,* 411 U.S. at 173 (quoting *United States v. Kagama,* 118 U.S. 375, 381-382 (1886)) (emphasis added). Concluding that the Chickasaw Nation's retained sovereignty provides an independent federal law basis for preempting application of Oklahoma tax law as to non-Indian Country relationships not only would effectively impute to the Tribe governmental status *exceeding* that of the individual states but also would give it extra-territorial authority wholly inconsistent with heretofore recognized limits on inherent tribal powers. *See Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 142 (1982) ("[w]e do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe"). Tribal members, by establishing residency outside their Tribe's territory, have elected to partake of the benefits and to assume the burdens attendant to such status. One burden is payment of taxes on income, including income earned from tribal employment. With respect to those taxes, they are not "reservation Indians" (*Williams v. Lee,* 358 U.S. 217, 220 (1959)) as to whom Congress has evinced a "jealous

regard for Indian self-governance." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986). Consequently, even if the Respondent opts to raise at this late hour the question left open in *Sac and Fox*, it must be answered negatively.

CONCLUSION

The Court of Appeals' Judgment should be vacated with respect to the invalidation of Oklahoma's motor fuel taxes. It should be reversed with respect to the invalidity of Oklahoma's income tax.

Respectfully submitted,

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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit

BRIEF OF AMICUS CURIAE CHEROKEE NATION IN SUPPORT OF RESPONDENT

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For The Tenth Circuit

BRIEF OF AMICUS CURIAE CHEROKEE NATION IN SUPPORT OF RESPONDENT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Cherokee Nation respectfully submits a Brief Amicus Curiae pursuant to Supreme Court Rule 37.3 in Support of the Respondent.

THE INTEREST OF THE AMICUS CURIAE CHEROKEE NATION

The Cherokee Nation has an interest in this action insofar as it concerns the state fuel tax issue for several

reasons. First, the Cherokee Nation shares a similar legal history with the Chickasaw Nation, being one of the five federally recognized tribes historically referred to as the "Five Civilized Tribes" (hereinafter referred to as "Five Nations.")[1] It accordingly has a strong interest in participating in any major decision which could subsequently directly or indirectly affect interpretation of the legal status of these tribes arising from their common history.

Second, the Cherokee Nation has an interest in protecting its ability to fully exercise important governmental functions. It is a strong governmental entity operating under a self-governance compact with the United States, and exercising the following governmental powers: executive functions, including operation of numerous federal programs such as its Roads and Transportation Program, and including taxation of cigarette sales; legislative functions, including development of a comprehensive code of laws; and exercise of judicial powers through its own court system.

Third, the Cherokee Nation has an interest in protecting potential tribal economic development and tax revenues. Although it is not presently operating any gas retail business, it has enacted a tribal law imposing a tax on tribal fuel sales in the event that it establishes a gas retail business in the future. A portion of this tribal revenue may be made available for law enforcement functions exercised on roads running through Indian country and

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[1] The other three of the Five Nations are the Choctaw, Seminole and Muscogee (Creek) Nations.

for construction and maintenance of roads in the Cherokee Nation's jurisdictional area to assist rural Indians and non-Indians whose needs are not currently adequately met by the state or county roads systems.

SUMMARY OF ARGUMENT

The Tenth Circuit correctly held that the legal incidence of the state fuel tax fell upon the retailer Chickasaw Nation. It also correctly applied a "per se" rule to the fuel taxation issue, finding any consideration regarding use of the tax irrelevant in its evaluation of the nature of the tax, because a "balancing of the respective tribal and state interests at stake is not relevant to a determination of the propriety of the fuel taxes." *Chickasaw Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, 31 F.3d 964, 972 (10th Cir. 1994),[2] *cert. granted*, 130 L.Ed.2d 621, 115 S.Ct. 714 (1995).

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[2] The Tenth Circuit stated in its opinion: " . . . Here, the proceeds of the fuel tax go almost exclusively to the building and maintaining of highways in the state of Oklahoma, both within Indian country and without. This fact does not alter the nature of the fuel taxes as simple revenue measures. Because they are directed toward funding traditional government activities, the taxes fall within the ambit of the sovereignty of the tribal government. Accordingly, the district court erred in concluding that imposition of the fuel tax on the tribal retailer was not preempted by federal law. Where the state action conflicts with a power within the traditional scope of Indian sovereign authority, preemption is presumed in the absence of an explicit statement of congressional intent to the contrary. *Rice [v. Rehner]*, 463 U. S. [713] at 719-20 [(1983)]. The state has directed our attention to no such explicit grant of congressional approval of the taxation scheme here at issue and we know of none."

However, rather than advancing arguments on those two broad issues, which would likely be repetitions of the Respondent Chickasaw Nation's arguments, the Amicus Cherokee Nation will present the Court with legal authority on matters which the Court may determine to be related to the fuel tax issue, but not briefed by Respondent. The Cherokee Nation will first present the Court with a historical backdrop illustrative of the very direct manner in which Congress has always dealt with the Five Nations, and illustrative of the continued existence of important tribal governmental interests requiring the protection of this Court by application of the "per se" rule. The Cherokee Nation will then respond to assertions of Petitioner Oklahoma Tax Commission (hereinafter referred to as "Tax Commission") and the Amici South

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Chickasaw Nation v. Oklahoma ex rel., Oklahoma Tax Commission, 31 F.3d at 972 (10th Cir. 1994). Although the Tenth Circuit refers to a "presumption" of tax exemption for Indian tribes, the rule could be more accurately characterized as a "per se" rule, in light of statements by this Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, n. 17 (1987) that: "In the special area of state taxation of Indian tribes . . . we have adopted a per se rule . . . and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear . . . " It should be stressed here that state taxation is not the same thing as state regulation. See *Bryan v. Itasca County*, 426 U.S. 373 (1976) (holding that the applicability of a Public Law 280 state's civil laws in Indian country by virtue of Public Law 280 did not result in express Congressional consent to tax on reservation activities). Under the per se rule, state taxation is not permissible absent express Congressional consent, while state regulation may be allowed when state and tribal interests are balanced under the infringement test.

Dakota, California, Louisiana, Mississippi Montana, Nevada, North Dakota, Oregon, Utah, Wisconsin, and Wyoming (hereinafter referred to as "Amici States") that the Hayden-Cartwright Act does not apply to motor fuel sales by Indian tribes in Indian country.[3]

ARGUMENT

PROPOSITION I. APPLICATION OF ANY TEST OTHER THAN THE "PER SE" RULE TO THE TAX COMMISSION'S ATTEMPTS TO TAX TRIBAL ACTIVITIES WOULD BE CONTRARY TO THE JUDICIALLY RECOGNIZED SURVIVAL OF THE FIVE NATIONS' GOVERNMENTAL INTEGRITY THROUGH MORE THAN A CENTURY OF "SPECIAL" CONGRESSIONAL ENACTMENTS.

A. THE FIVE NATIONS, INCLUDING THE CHICKASAW NATION, EXERCISE FULL EXECUTIVE, LEGISLATIVE AND JUDICIAL GOVERNMENTAL POWERS.

The Tax Commission's request that the Court deviate from application of a "per se" rule of construction regarding imposition of the state fuel tax on one of the Five Nations is ironic in light of the hard-won legal battles which they have fought since the early 1800s. The Tax

[3] The Cherokee Nation agrees with Respondent Chickasaw Nation's assertion that the Hayden-Cartwright claim is not properly before this Court. However, should the Court choose to address that claim, Cherokee Nation wishes to provide the Court with arguments concerning the inapplicability of the act to fuel sales by Indian tribes in Indian country.

Commission's attempt to mislead the Court into believing that the Five Nations have only remnants of sovereignty left, based on an outdated version of Cohen's Handbook of Federal Indian Law and a 1943 decision of this Court is contrary to recent caselaw which has repeatedly recognized the sovereign strength of the Five Nations.[4]

The Tax Commission attempts to mislead the Court into believing that Congress abrogated the Treaty of Dancing Rabbit Creek, Treaty of September 27, 1830, 7 Stat. 333, by subjecting the Five Nations to Arkansas laws by the Oklahoma Organic Act, Act of May 2, 1890, ch. 182, 26 Stat. 81 and to the laws of Oklahoma Territory by the Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 267. Petitioner's Br. at 3. The Organic Act did not make the Five Nations subject to the laws of Arkansas.[5] And, as recognized by the Tenth Circuit, the

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[4] The Tax Commission cites a "1971 version of Cohen (actually a reprint of the 1942 edition) as stating that the "virtual dissolution of the tribal governments cleared the way for the creation of another state." Consistent with its confrontational approach to tribal/state relations, the Tax Commission relied on the fifty year old edition of the treatise, rather than the 1982 edition, which states that dissolution of the tribal government was not accomplished, citing *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), aff'd sub nom. *Harjo v. Andrus*, 581 F.2d 949 (DC Cir. 1978). Felix Cohen's Handbook of Federal Indian Law, Wilkinson & Strickland, Eds. (1982 Ed.) at 784.

[5] The Organic Act included extensive provisions establishing a territorial government, including territorial courts, in Oklahoma Territory, 26 Stat. 81 §§ 2-28. It also included provisions expanding the jurisdiction of the federal courts in Indian Territory. 26 Stat. 81, §§ 29-43. However, it expressly reserved criminal and civil jurisdiction over tribal members to the courts of the Five Nations. 26 Stat. 81 §§ 30, 31.

Enabling Act only transferred the nonfederal jurisdiction of the federal courts in Indian Territory to the state courts, and only applied Oklahoma territorial laws "as far as applicable":

> Two months after enacting the Five Tribes Act, Congress passed an enabling act to permit the people of the Oklahoma and Indian territories to form a state. *See* Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906); Enabling Act Amendment, ch. 2911, 34 Stat. 1286 (1907). The enabling act provided that federal Article III courts would succeed the special United States court in the Indian territory with respect to all cases arising under the Constitution, laws, or treaties of the United States. *See* Enabling Act Amendment, § 1, 34 Stat. at 1286-87 (amending § 16 of the Oklahoma Enabling Act). *The state courts created upon statehood were to succeed the Indian territory courts with respect to the remaining nonfederal cases. See Id.* 2, 3, 34 Stat. at 1287 (amending §§ 17 and 20 of Oklahoma Enabling Act). The enabling act also provided that "the laws in force in the Territory of Oklahoma, *as far as applicable*, shall extend over and apply to said State." Oklahoma Enabling Act, § 3, 34 Stat. at 275 (emphasis added). Finally, the enabling act preserved the authority of the federal government over Indians and their lands, and required the State to disclaim "all right and title" to such lands. *See Id.* § 1, 3, 34 Stat. at 267-68, 270.
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> * * *
>
> . . . The language of the Oklahoma [Enabling] Act, read in its historical context, suggests that Congress intended to preserve its jurisdiction and authority over Indians and their lands in

> the new state of Oklahoma until it accomplished the eventual goal of terminating the tribal governments, assimilating the Indians, and dissolving completely the tribally-owned land base – *events that never occurred and goals that Congress later expressly repudiated.* The State has failed to cite any acts of Congress that clearly reveal an intent to divest the federal and tribal governments of jurisdiction over Creek tribal lands and to confer such authority on the State of Oklahoma.
>
> * * *
>
> . . . Considering Congress' clearly express intent that Creek Nation lands be set apart for the Creeks and be immune from state laws, *we believe that divestiture of that federal and tribal authority over these lands "would require an equally clear expression of congressional intent."* . . .

Indian Country U.S.A. v. Oklahoma Tax Commission, 829 F.2d 967, 974, 978-79 (10th Cir. 1987), cert. den. sub nom. *Oklahoma Tax Commission v. Muscogee (Creek Nation)*, 487 U.S. 1218 (1988) (Emphasis added).

This finding by the Tenth Circuit was reenforced in *U.S. v. Sands*, 968 F.2d 1058 (10th Cir. 1992), cert. denied, 122 L.Ed.2d 139, 113 S.Ct. 987 (1993). In that case the federal government took the incredible position on appeal, after successfully prosecuting the Indian defendant in federal court, that the federal courts had no jurisdiction over major crimes prosecutions of Indians for crimes committed in Creek Indian country. The Tenth Circuit's response was as follows:

> . . . The government's position in this case is virtually identical to that of the State of Oklahoma in *Indian Country, U.S.A.*, although the government relies on the Act of April 28, 1904 as additional support for the theory. We agree with amici Muscogee (Creek) Nation and Seminole Nation that the enactments relied on by the government did not abrogate the federal government's authority and responsibility, nor allow jurisdiction by the State of Oklahoma. Amici Brief at 9-16; *Indian Country, U.S.A.*, 829 F.2d at 978. Additionally, the government's construction of the Oklahoma Enabling Act ignores § 1 of that Act, 34 Stat. 267-78, which preserved federal authority. *Indian Country, U.S.A.*, 829 F.2d at 979.

The Five Nations have steadily dispelled the myth of their "dissolution" in cases such as *Indian Country U.S.A.* and *Sands*. Other significant cases include *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), aff'd sub nom. *Harjo v. Andrus*, 581 F.2d 949 (DC. Cir. 1978), and *Muscogee Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), cert. denied, 488 U.S. 1010 (1989). In *Harjo* the executive and legislative powers of the Muscogee (Creek) Nation were found to be intact, and in *Muscogee (Creek) Nation*, the judicial powers of the Muscogee (Creek) Nation were recognized. These decisions, which interpreted many seemingly destructive federal laws shared in common by the Five Nations, resulted in the same conclusions for the other four Indian nations.

During the same time period in which the Five Nations have rebuilt recognition of their governmental powers, the Indian country status of lands within their

original domains has also been established. *Indian Country U.S.A.*, supra (unallotted tribal fee lands); *State v. Klindt*, 782 P.2d 401 (Ok. Cr. 1989), *State v. Brooks*, 763 P.2d 707 (Ok. Cr. 1988), cert. denied, 490 U.S. 1031 (1989), *U.S. v. Sands*, supra, *Cravatt v. State*, 825 P.2d 277 (Ok. Cr. 1992) (restricted allotted lands); *Housing Authority of Seminole Nation v. Harjo*, 790 P.2d 1098 (Okla. 1990) (Indian housing property constituting dependent Indian community). These cases resulted in the establishment of tribal or "CFR" court systems for the Five Nations.[6]

B. THE FIVE NATIONS HAVE A SIGNIFICANT GOVERNMENTAL INTEREST IN STATE ROADS.

The Five Nations made a significant contribution to Oklahoma roads at the time of statehood, The Five Tribes Act, Act of April 26, 1906, ch. 1876, 37 Stat. 137, 146, provides:

> Sec. 24. That in the Choctaw, Chickasaw, and Seminole Nations public highways or roads two rods in width, being one rod on each side of the section line, may be established on all section lines; and all allottees, purchasers, and others shall take title to such land subject to this provision, and if buildings or other improvements are damaged in consequence of the establishment of such public highways or roads, such damages accruing prior to the inauguration of a

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[6] Two of the Five Nations by choice use a "CFR" court system operated by the Bureau of Indian Affairs pursuant to 25 CFR Part 11, while the other three maintain courts operated by the tribes themselves.

> State government shall be determined under the direction of the Secretary of the Interior and be paid for from the funds of said tribes, respectively.
>
> All expenses incident to the establishment of public highways or roads in the Creek, Cherokee, Choctaw, Chickasaw, and Seminole Nations, including clerical hire, per diem, salary, and expenses of viewers, appraisers, and others, shall be paid under the direction of the Secretary of the Interior from the funds of the tribe or nation in which such public highways or roads are established . . . [7]

The Oklahoma Constitution, Article 16, § 2, contains the following related provision:

> The State of Oklahoma hereby accepts all reservations and lands for public highways made under any grant, agreement, treaty, or act of Congress: Provided, This section shall not be construed to prejudice the vested rights of any tribe, allottee, or other person to any such land.[8]

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[7] A provision similar to § 4 is contained in Section 37 of the Cherokee Allotment Agreement, Act of July 1, 1902, 32 stat. 716, 722. According to state interpretations, § 4 was prospective and did not authorize state authorities to take for road purposes, without compensation, those Indian lands which had been allotted prior to the passage of the 1906 Act. *Dudley v. Meggs*, 153 P. 1121 (OK. 1915); *Good v. Keel*, 116 P. 777 (OK. 1911).

[8] The Oklahoma Supreme Court has held that this provision is "merely declaratory of the law as it already existed, as such acceptance could have no effect, where private rights and interests had attached to such lands before the adoption of such provision." *Mills v. Glascock*, 110 P. 377, 379 (OK. 1910).

Tribal members have contributed through payment of the state gross production tax by express Congressional directive subjecting mineral estates in Five Nations restricted property to the tax. Act of May 10, 1928, ch. 517, 45 Stat. 495, 496, § 6. A significant percentage of the gross production tax revenues levied on oil, gas and minerals is included as a funding source for the State General Revenue Fund, which is used for state roads purposes along with federal contributions and special state highway funds. 68 O.S. § 1004a(B). Counties with oil, gas and minerals resources also receive 10% of the gross production tax revenue attributable to their counties for deposit in the county highway funds. 68 O.S. § 1004(3), 1004a(A). Since some portions of eastern Oklahoma have historically enjoyed very lucrative oil and gas production, the Five Nations have made a substantial contribution to state revenues not shared by other tribes.[9]

The Cherokee Nation is actively exercising its governmental interest in roads in Indian country. Federal

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[9] The 1928 act addressed Congressional concerns which were stated only four years before its passage, during discussions concerning Oklahoma non-taxable allotted Indian lands at hearings concerning federal highway funding. At the hearings, Congressman Manlove posed the following question: "Upon what basis would the Government be charged [for roads] in the case of lands in northeast Oklahoma, which, by reason of oil wells and large zinc mines, have a special value? Those oil and zinc properties are nontaxable under a late ruling, for income tax purposes, or otherwise. On what basis would the Government be charged in the case of those lands?" Roads Hearings Before the Committee on Roads, House of Representatives, 68th Cong., 1st Sess, on H.R. 8885 and H.R. 8907 (April 25, 1924) at 3 (hereinafter referred to as "Roads Hearings").

highway legislation expressly provides that the Indian Self-Determination and Education Assistance Act applies to all funds appropriated for the construction and improvement of Indian reservation roads and administered by the Secretary of Interior. 23 U.S.C. § 204. Following the advent of Self-Governance, now a permanent federal program established in 25 U.S.C. § 450 *et seq.*, by Pub. Law 103-413, Act of October 25, 1994, 108 Stat. 4250, the Cherokee Nation and other tribes have compacted for tribal administration of the Indian roads program.[10]

The Cherokee Nation, and the other four tribes, also have an important governmental interest in law enforcement on the roads. While the jurisdictional status of roads running through Indian country in eastern Oklahoma has not been litigated, some cases in other states have found a lack of state jurisdiction over such roads in certain

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[10] In the 1994 fiscal year, more than $17.5 million in federal funds were allocated to the Bureau of Indian Affairs and/or Indian nations in Oklahoma for roads projects pursuant to 23 U.S.C. § 202. The Cherokee Nation alone had federal roads funding in the amount of more than $4 million for its 1994 fiscal year for its roads program, administered by its Transportation and Roads Program as authorized by a compact between the Nation and the federal government. "Addendum to FY 1994 Annual Funding Agreement Between Cherokee Nation and the United States (Department of Interior)" executed pursuant to the Indian Self-Determination Act, 25 U.S.C. 450f. Prior to the administration of this funding by the Nation, federal roads funding for the fourteen county area within the geographic boundaries of the Cherokee Nation were administered by the Bureau of Indian Affairs. On a national scale, the Federal Highway Administration had $191 million allocated for the Indian roads in FY 1994. This funding is used for public roads located within or leading to Indian country or an Indian community, traveled by non-Indians and Indians alike.

circumstances.[11] Although the Oklahoma Highway Patrol generally exercises law enforcement functions on state roads, Indian tribes often share this responsibility through cross-deputization agreements. Since the motor fuel tax deposited in the State General Fund is used in part to support state police, it is logical that the Five Nations should access tribal tax revenues for law enforcement on highways in Indian country, a function beneficial both to Indian and non-Indian users of such highways.[12]

PROPOSITION II. THE HAYDEN-CARTWRIGHT ACT DOES NOT APPLY TO FUEL SALES BY THE FIVE NATIONS ON INDIAN COUNTRY.

Both Petitioner and Amici States argue that the Hayden-Cartwright Act, codified at 4 U.S.C. § 104, authorizes the state to impose motor fuel taxes on sales to all persons within Indian Country. Petitioner should be precluded from raising this issue now because it was not raised at the trial level and was not raised in the appeal to

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[11] *Schantz v. White Lightning*, 502 F.2d 67 (8th Cir. 1974) (Indian cannot be sued in federal court for negligence in causing a car accident on a public highway within Indian country); *U.S. v. Harvey*, 701 F.2d 805 (9th Cir. 1983), reh'g denied, 711 F.2d 144 (9th Cir. 1983). (State police lack authority to arrest an Indian driving while intoxicated on a United States highway built on a state right-of-way through Indian land).

[12] Four of the Five Nations have adopted tribal laws which impose tribal taxes replacing the state fuel tax. Chickasaw Nation Law 11-011 (August 11, 1994), Choctaw Nation Bill 163-94 (August 13, 1994) Seminole Law 94-13 (September 3, 1994) and Cherokee Nation Legislative Act 8-94 (December 12, 1994).

the Tenth Circuit. However, Amicus Cherokee Nation wishes to respond, should this Court determine consideration of this issue appropriate.

The Hayden-Cartwright Act was first enacted as Public Law 74-686, Act of June 16, 1936, ch. 582, § 10, 49 Stat. 1519, 1521-22 (1936), was reenacted by Act of July 30, 1947, ch. 389, 61 Stat. 644, and was amended to include Guam as a "territory" as used in the Act, by the Act of August 1, 1956, ch. 827, 70 Stat. 799. In its present form it provides:

> (a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels *when sold by* or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders *and other similar agencies*, located on *United States military or other reservations*, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.
>
> (b) The *officer in charge of such reservation* shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory, or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel with respect to which taxes are

payable under subsection (a) for the preceding month.

(c) As used in this section, the term "Territory" shall include Guam.

4 U.S.C. § 104.

Amici States argue that the Act's reference to "United States military and other reservations" and to "licensed traders" demonstrates a Congressional intent to authorize state fuel taxes against Indian tribes selling fuel in Indian country. There are a number of flaws in this reasoning.

The primary flaw is the fact that the Act imposes a tax when fuel is sold by certain specified "agencies," including "licensed traders." Even if Congress had intended to impose a tax on sales by "licensed traders" located on "reservations", the Act does not impose a tax on sales *by Indian tribes*. This is an important distinction. "[S]tatutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373 (1976). "This principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities." *Id* at 392, citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973), *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956); *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930). "This is so because Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate [a tax] immunity and allow states to treat Indians as part of the general community." *Id* at 392 (bracketed "a tax" included in text of *Itasca*

case), citing dissent in *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 13-614 (1943).[13]

Another fatal flaw is that Congress did not expressly reference Indian lands in the Hayden-Cartwright Act, merely referring to "United States military and other reservations."[14] When the Hayden-Cartwright Act was

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[13] Although not essential to its argument, Amicus Cherokee Nation is also curious as to the State's interpretation of provisions in the Act placing reporting requirements on "the officer in charge of the reservation," a term which does not remotely refer to any tribal official or employee responsible for fuel sales operations. It is elementary that statutory language must be read so as to be consistent with the legislative intent and not to interpret the words of the statute so as to lead to absurd results. *Monamotor Oil Co. v. Johnson*, 3 F. Supp. 189 (1933), aff'd 292 U.S. 86 (1934). If the Hayden-Cartwright Act applied to fuel sales by tribes in Indian country, who would the federal "officer in charge of the reservation" be? The Cherokee Nation no longer has a BIA agency or an agency superintendent. Its government deals directly with the BIA central office on a government to government basis.

[14] Although the definition of "Indian country" was not codified at 18 U.S.C. § 1151 until 1948, judicial definitions had already carried the definition of Indian country beyond "reservations", to include trust and restricted allotments, as well as dependent Indian communities. See *Bates v. Clark*, 95 U.S. 204 (1877) (land held in "original" Indian title is Indian country); *Donnelly v. United States*, 228 U.S. 243 (1913) (Indian reservations set apart out of the public domain constitute Indian country) *U.S. v. Sandoval*, 231 U.S. 28 (1913) (lands owned in fee by Indian tribe constitute Indian country); *U.S. v. Pelican*, 232 U.S. 442 (1914) (trust allotment is Indian country); *U.S. v. Ramsey*, 271 U.S. 467 (1926) (restricted allotment is Indian country). If Congress had been concerned with a lack of revenues from Indian country lands, it would have expressly included Indian trust and restricted allotments in the Hayden-Cartwright Act, rather

enacted in 1936, the State of Oklahoma and federal officials were still laboring under the false premise that there was no Indian country in Oklahoma.[15] In light of this fact, it is difficult to infer a Congressional intent to impose the taxation requirement on the Five Nations by a vague 1936 reference to "other reservations" almost sixty years later, after the tribes through hard-won legal battles have finally established judicial recognition of the Indian country status of their property and recognition of their governmental authority.

The Amici States' partial review of the legislative history of federal highway legislation is also flawed and contradictory to the States' position. Amici States apparently attempt to show that this legislation indicates congressional concern with the tax-exempt status of Indian lands, and that this concern finally lead to the "reservation" language in the Hayden-Cartwright Act. The flaw in their argument is that Congress has historically had no trouble being specific and saying exactly what it means when referencing Indian lands in any manner.[16]

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than the simple reference to "other reservations" contained in the Act.

[15] It was not until 1989, in *State v. Klindt*, 782 P.2d 401 (Okla. Cr. 1989), that the Oklahoma Court of Criminal Appeals overruled an earlier decision that the state had jurisdiction to prosecute a murder committed on a Choctaw restricted allotment, *Ex Parte Nowabbi*, 61 P.2d 1139 (Ok. Cr. 1936), based on a finding that a restricted Choctaw allotment was not an "Indian reservation." See also *United States v. Sands*, 968 F.2d 1058 (10th Cir. 1992), *cert. denied*, 122 L.Ed.2d 139, 113 S.Ct. 987 (1993).

[16] The Federal Highway Act, 23 U.S.C. § 101, includes the following definitions containing specific descriptions of types of Indian lands affected: "The term "public lands highways"

The federal highway legislation is a good example of Congressional ability to describe types of Indian lands to be covered, and demonstrates that Congress's method of dealing with Indian reservations and nontaxable Indian lands was through the federal highway legislation, not through the Hayden-Cartwright Act, which was not part of the federal highway legislation. The Amici States' discussion of the legislative history of federal highway legislation, which included special funding provisions for "nontaxable Indian lands, individual and tribal," demonstrates that Congress knew the distinction between Indian reservations and nontaxable Indian lands.[17] In

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means those main highways through unappropriated or unreserved public lands, *nontaxable Indian lands*, or other Federal reservations, which are on the Federal-aid systems . . . The term "Federal lands highways" means forest highways, public lands highways, park roads, parkways and Indian reservation roads which are public roads . . . The term "Indian reservation roads" means public roads that are located within or provide access to an *Indian reservation or Indian trust land or restricted Indian land* which is not subject to fee title alienation without the approval of the Federal Government, or Indian and Alaska native villages, groups, or communities in which Indians and Alaskan Natives reside, whom the Secretary of the Interior has determined are eligible for services generally available to Indians under Federal laws specifically applicable to Indians.

[17] For example, the Act of May 21, 1928, ch. 660, 45 Stat. 683, provided for special federal funding for "any State containing unappropriated public lands and nontaxable Indian lands, individual and tribal, exceeding 5 per centum of the total area of all lands in the States in which the population, as shown by the latest available Federal census, does not exceed ten per square mile of area." Subsequent acts continued to authorize the additional funding in states having such lands, always using the language "nontaxable Indian lands, individual and tribal." Act

fact, as demonstrated by the following exchange during congressional hearings in 1924, "Roads Hearings" at 2, members of Congress recognized a distinction between Indian reservation and nontaxable Indian lands in Oklahoma as follows:

> Mr. Carter. * * *
>
> Now, take the State of Oklahoma, for instance, you will find on the east side of the State that we have 40 counties, formerly known as the reservations of the Five Civilized Tribes. There are about 19,500,000 acres of land on that side of the State, comprising the 40 counties, and about 16,000,000 acres of that land has been allotted to enrolled members of the five tribes and is nontaxable – some for 21 years and some in perpetuity – so that in the beginning we had only 3,500,000 acres of land in those 40 counties out the 19,500,000 acres which could be taxed.
>
> That condition, of course, very greatly hampered the building of roads in our State, and we would like to have the same benefits to apply to nontaxable Indian lands as are applied to unappropriated public lands. They stand exactly upon the same basis, since the Federal Government has exempted those lands from taxation. The unappropriated public lands, of course, belong to the Nation, and they are not taxable. The Indian lands are usually exempted from taxation by treaty, or if not by treaty, by law. . . .

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of December 20, 1944, ch. 626, 58 Stat. 838, § 5(a); Public Law 85-767, Act of August 27, 1958, 72 Stat. 885, § 120(a); Public Law 90-495, Act of August 23, 1968, 82 Stat. 815, § 34.

* * *

Mr. Robison. When the act of November 9, 1921,[18] was considered, that question was raised in conference, but somebody made the point that the Department of the Interior had a special appropriation with which they build roads through Indian reservations.

Mr. Hudspeth. That would not apply to this situation, because these lands are not in Indian reservations.

MR. CARTER. In our case and in many other cases the lands are already allotted. It ceases to be a reservation when the lands are allotted, and the lands become merged with the balance of the lands of the State, but they still remain nontaxable.

MR. ROBISON. There is an appropriation provided to take care of road building in Indian reservations, but your point is that the lands have been taken from the reservation status and have been allotted. They have been taken out of the reservation, but are non-taxable, and there is no way to reach them.

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[18] Congressman Robison was referring to the Federal Highway Act of November 9, 1921, 42 Stat. 212. Separate federal funds have historically been appropriated for "Indian reservation roads" pursuant to that law, as amended by Act of June 24, 1930, 40 Stat. 805, by federal appropriations legislation. See Act of June 18, 1934, 48 Stat. 992, § 6; Act of June 16, 1936, ch. 582, 49 Stat. 1519; Act of June 8, 1938, ch. 328, 52 Stat. 633, § 9. Separate appropriations have also been made for unappropriated or unreserved public lands and "nontaxable Indian lands." See 52 Stat. 633, § 6.

This 1924 exchange shows that when Congress enacted the Act of February 12, 1925, ch. 219, 43 Stat. 889, 890, to include the terms "nontaxable Indian lands, individual and tribal," to federal laws already providing additional federal funding to states with unappropriated public lands, it knew the distinction between "Indian reservations" and other types of Indian lands.[19] Knowing that distinction, it chose to use the term "other reservations" a few years later in the Hayden-Cartwright Act. Thus, while congressional intent in the federal highway legislation was to provide supplemental *federal* funds for roads in Indian reservations and nontaxable Indian lands, its intent in the Hayden-Cartwright Act was to require "agencies" (not Indian tribes) selling fuel on non-Indian "United States" reservations (not Indian reservations) to pay state motor fuel taxes. It is not logical to assume otherwise.

Amici States incorrectly state in their Brief, p. 6, fn 2, that "Felix Cohen agreed with the Department of Interior's administrative ruling in his seminal treatise, as did the subsequent revisions of that treatise." As noted in the forward, p. V of the 1971 University of New Mexico reprint of the original 1942 edition of the handbook, the 1958 edition cited by Amici States was a revision by the Bureau of Indian Affairs to better serve its termination policy. The 1982 edition states that the legislative history

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[19] The Amicus Cherokee Nation does not necessarily agree with the congressional perception that Indian reservations no longer exist in Oklahoma. However, the discussion in the 1924 hearings plainly demonstrates the congressional understanding that there is a distinction between "Indian reservations" and Indian allotments.

of the Hayden-Cartwright Act contains no congressional understanding that "Indian reservations" were intended to be included, and simply notes without comment the Interior Solicitor's interpretation of the law.[20] For the reasons already stated herein, the Interior Solicitor's conclusion does not apply to the Five Nations.

As a final note, the Hayden-Cartwright Act must be considered in light of the Preamble of the Oklahoma

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[20] See 57 I.D. 129 (1940). The 1982 edition states: " . . . In passing this statute *Congress did not consider its possible application to transactions involving reservation Indians.* The tax authorization was first passed as part of a 1936 highway construction statute, and other sections of the Act refer to Indian reservation roads. Act of June 16, 1936, ch. 582, §§ 3, 6, 49 Stat. 1519, 1520, 1521. But the tax authorization was not part of the initial bill that passed the House and cleared the appropriate Senate committee. H.R. 11687, 74th Cong. 2d Sess (1936). See 80 CONG. REC. 5613, 6408 (1936). Thus, the committee reports make no reference to it. H.R. REP. NO. 2371, 74th Cong. 2d Sess. (1936); S. REP. No. 1976, 74th Cong. 2d Sess. (1936). A separate bill proposing the tax authorization had been introduced in the House H.R. 3660, 74th Cong. 2d Sess. (1936). When the highway bill came before the full Senate, the provisions of H.R. 3660 were added as a floor amendment, 80 CONG. REC. 6913 (1936). There is no separately published history on H.R. 3660, and the subsequent Conference Report on Cong. 2d Sess. 1 (1936). *During final debate, a House member described the tax section as dealing with a problem in "post-exchange stores and on Government reservations."* 80 CONG. REC. 8701 (1936) (Mr. Whittington). See also id. (Senate) . . . The *Interior Solicitor has concluded* that the statute does not authorize state taxation of fuel purchased by a tribal enterprise to operate a tribal sawmill but does authorize state taxation of retail sales by the tribal enterprise, both to Indians and to other person. 57 Interior Dec. 129 (1940)." *Felix Cohen's Handbook of Federal Indian Law*, (Strickland and Wilkinson, Ed., 1982), p. 412, fn 62 (emphasis added).

Enabling Act, Act of June 16, 1906, 37 Stat. 267, which expressly recognizes that the establishment of the State of Oklahoma would not impair Indian rights or federal authority regarding Indian rights as follows:

> . . . Provided, That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (*so long as such rights shall remain unextinguished*) or to limit or affect the authority of the Government of the United States to make any law or regulations respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed. . . .

The phrase "so long as such rights shall remain unextinguished" obviously does not refer to extinguishment by the state. It can only refer to express extinguishment by Congress. Congress did not extinguish Five Nations treaty protections against applicability of state laws by enactment of the Hayden-Cartwright Act.

CONCLUSION

The Oklahoma Tax Commission is one of the last bastions of state resistance to the legal and physical reality of the presence of the Five Nations in eastern Oklahoma. Their actions are inconsistent not only with the

governmental status of the Five Nations, but also with state policies recognizing tribal sovereignty.[21]

In 1994 the Oklahoma State Senate enacted Enrolled Senate Concurrent Resolution No. 62, which established the Oklahoma State-Tribal Economic Development Task Force, to evaluate federal, state, tribal and private resources available for economic development; to identify jurisdictional barriers which hinder economic development efforts; to recommend methods for establishing an effective, mutually beneficial effort for developing joint state-tribal economic activities; and to file a report on findings and proposed legislative recommendations of the task Force with the Governor and the Legislature.

The resulting report, State of Oklahoma SCR 62, Oklahoma State Tribal Economic Development Task Force, December 1994 (hereinafter referred to as "Task Force Report"), included findings that the following matters are a barrier to progress: continuing litigation regarding tribal taxation and other state-tribal issues and the acceptance of erroneous information that is either under-

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[21] Although the Tax Commission repeatedly refused to negotiate with the Five Tribes concerning taxation of cigarettes in Indian country, in 1993 the Five Tribes successfully negotiated a compact with state legislative staff, approved by the Governor of Oklahoma, which has resulted in the economic benefit of both parties to the compact. See also Tribal/State Relations Act, 74 O.S. § 1222 (establishing Oklahoma State/Tribal Relations Committee with authority to approve tribal/state intergovernmental agreements, subject to Governor's approval); and 12 O.S. § 728 (providing for state/tribal reciprocity in recognition of state and tribal court orders).

represented, over-represented or misrepresented in relation to tribal impact on state revenue. Task Force Report at 6, 7. The report includes in its recommendations that the state employ an attorney that is trained in or specializes in Indian law as a resource for the Governor's office, who could also be used by the Tax Commission to avoid "unnecessary litigation that is costly to both the States and tribes." Task Force Report at 9.

The Tax Commission's purported concerns about the effect of application of a per se rule in this action on state revenues is irrelevant and obviously not shared by other state officials. Its untimely effort to seek a finding of applicability of the Hayden-Cartwright is a characteristic last-ditch effort to save face. These desperate measures of the Tax Commission should not be allowed by the Court. Amicus Cherokee Nation accordingly respectfully requests that the judgment of the Tenth Circuit Court of Appeals be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF THE NAVAJO NATION OIL AND GAS CO., INC., AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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BRIEF OF THE NAVAJO NATION OIL AND GAS CO., INC., AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The Navajo Nation suffers from a lack of roads. Historically, the states ignored the infrastructure needs of the Navajo Indian country, believing that the satisfaction of these needs was a purely federal function. *See Warren Trading Post Co. v. Arizona State Tax Comm'n*, 380 U.S. 685, 690-01 & n.17 (1965). The federal government's commitment to providing roads in Navajo Indian country has wavered, as well. *See, e.g.*, 95 Cong. Rec. 10,644 (1949) (quoting 1937 edict of Commissioner of Indian Affairs John Collier, establishing 2,935,000 acres of the Navajo

reservation as a roadless area). Thus, in 1975 Navajo Indian country had 60 miles of paved roads per 1000 square miles, compared with 154 miles in comparable rural areas in the Southwest. United States Comm'n on Civil Rights, *The Navajo Nation: An American Colony* 41 (1975). The disparity is worsening.[1]

In seeking to remedy its infrastructure deficit, the Navajo Nation applied for and received funding under the Community and Economic Development Grant Program of the Bureau of Indian Affairs. This program sought to enable Indian tribes to achieve tribal "self-reliance." *See* 57 Fed. Reg. 6122 (Feb. 20, 1992). The grant was used to determine the feasibility of a vertically integrated oil and gas company and, if feasible, to establish and operate such a company as an instrumentality of the Navajo Nation. Concurrently, Congress sought specifically to encourage the formation of vertically integrated tribal energy ventures in the Energy Policy Act of 1992. *See* 25 U.S.C.A. § 3503 (1994 Supp. Pamph.).

The Navajo Nation determined that a vertically integrated oil and gas company was feasible and formed its wholly owned Navajo Nation Oil and Gas Company by resolution in 1993[2] which, *inter alia*, establishes that the Company is an instrumentality of the Navajo Nation, requires that all shares of stock in the Company be held by the Navajo Nation, and requires that all dividends and

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[1] Paul E. Frye, *Lender Recourse in Indian Country: A Navajo Case Study*, 21 Univ. of New Mexico L. Rev. 275, 278 & n.9 (1991).

[2] Resolution no. CN-82-93 (Nov. 18, 1993). A certificate of incorporation was then issued under the Navajo Corporation Code. *See Lender Recourse, supra* n.1, at 301-304.

distributions of profit be devoted exclusively to essential governmental services.

The Navajo Nation created the Company in order to participate in all aspects of the oil and gas industry within Navajo Indian country, including the exploration and production of crude oil and natural gas, refining and manufacturing activities, and the wholesale and retail distribution of products manufactured by the Company from Navajo crude. In developing its business plans and investment strategy, the Navajo Nation and its Company have relied on the prior decisions of this Court defining the strict limitations on direct state taxation of Indian tribes within Indian country. The Navajo Nation Oil and Gas Company is therefore directly interested in the issues raised in this proceeding. Any departure from the clear standards established by *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); and the related decisions of this Court would undermine the economic development plans of the Navajo Nation and would subject the Nation and its Company to unnecessary and wasteful litigation.

SUMMARY OF ARGUMENT

If, as the Court of Appeals held, Oklahoma's fuel taxes are imposed on the tribal retailer, they are invalid unless Congress has authorized such state taxation of an Indian tribe in unmistakably clear terms. The only act of Congress mentioned by the Oklahoma Tax Commission here is section 10 of the Hayden-Cartwright Act, 4 U.S.C.

§ 104 (1988). This provision and its legislative history contain not one mention of Indian tribes or tribal enterprises, and no hint that states could tax them. Thus, this case is controlled by *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); and *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251 (1992).

As a substitute for express congressional authority for its taxes, the Commission seeks to engage in a balancing of interests, although such balancing is only required when the legal incidence of the tax is on non-Indians. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144-45 (1980); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). Moreover, its balancing of interests contorts beyond recognition the "reservation value" test.

The legal incidence test established by this Court in numerous decisions has historic significance, firm constitutional moorings, and immense practical value. The reservation value concept, as explained by this Court, serves important federal and tribal interests in promoting tribal self-determination and economic development, in fostering job creation in Indian country, in preserving the sovereign-to-sovereign relationship of tribes with the federal Government, and in honoring the constitutional framework which leaves Indians in Indian country free from state jurisdiction. These bedrock principles of federal law should not be abandoned when Oklahoma's problems could be resolved by minor amendments to its tax laws.

ARGUMENT

I. THIS COURT'S REQUIREMENT THAT ONLY CONGRESS MAY AUTHORIZE DIRECT STATE TAXATION OF INDIANS WITHIN INDIAN COUNTRY IS BASED ON FUNDAMENTAL CONSTITUTIONAL PRINCIPLES AND SOUND PUBLIC POLICY.

The Tenth Circuit's holding on federal preemption of the Oklahoma motor fuel taxes represents a straightforward and unremarkable application of this Court's precedents. This Court has consistently held that "[i]n the special area of state taxation" the legal incidence of a state tax may not be directly imposed on an Indian tribe or its members as to a transaction within Indian country unless Congress has authorized that tax in unmistakably clear language. *Blackfeet Tribe*, 471 U.S. at 765; *Cabazon Band*, 480 U.S. at 215. See also *Department of Tax. & Fin. of N.Y. v. Milhelm Attea & Bros.*, 512 U.S. ___, 114 S. Ct. 2028, 2035 (1994); *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. ___, 113 S. Ct. 1985, 1991 (1993); *County of Yakima*, 502 U.S. at 258; *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 175 (1989); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 162-64 (1980); *Bryan*, 426 U.S. at 377; *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 475-81 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171 (1973). The amicus brief filed in this matter by the States of South Dakota, California, Louisiana, Mississippi, Montana, Nevada, North Dakota, Oregon, Utah, Wisconsin and Wyoming correctly describes this rule of law as one of the "bedrock Indian law preemption principles" established by this Court. States' Amicus Brief at 2.

The Commission, on the other hand, asks this Court to abandon the bedrock principle of *Blackfeet Tribe* on the purported grounds that the principle is a meaningless formalism. The Commission asks this Court to sanction, for the first time in the Court's history, direct state taxation of an activity of an Indian tribe taking place within Indian country, even though Congress has not clearly and unmistakably authorized that state taxation. The Commission asks this Court to abandon the historic Indian exemption from direct state taxation simply because the tribal seller of motor fuel may be able to pass the state tax on to non-Indian consumers of the fuel. In short, the Commission would consign the viability of the historic Indian tax exemption to the vagaries of the marketplace, rather than to the considered political acts of Congress.

The bedrock principle that Congress, and only Congress, has the power to authorize direct state taxation of Indian activity and property within Indian country is not a mere formalism. That principle is derived from the Constitution itself. The Constitution vests the federal government, not the states, with exclusive authority over relations with Indian tribes. Art. I, § 8, cl. 3; *Blackfeet Tribe*, 471 U.S. at 764. The exemption of Indian tribes and their members from direct state taxation is a corollary of that fundamental division of authority in the Constitution. *Id.* While the theoretical basis for this tax exemption has changed over time, this Court has never wavered from the basic proposition that, absent unmistakably clear congressional sanction, direct state taxation of Indian tribes and their members within their Indian country is an

unjustifiable interference with the special sovereign status of the Indian tribes in the federal structure of government.

The Tenth Circuit's refusal to engage in a balancing test of tribal and state interests when the legal incidence of the state tax falls directly on the tribe or tribal members is entirely consistent with the precedents of this Court. During the years after the *McClanahan* decision, states raised a wide variety of arguments seeking to avoid the requirement that only Congress may lift the traditional Indian exemption from direct state taxation. This Court rejected all those attempts. In 1987 the Court gave clear notice that the issue had been laid to rest:

> We have repeatedly addressed the issue of state taxation of tribes and tribal members and the state, federal, and tribal interests which it implicates. We have recognized that the federal tradition of Indian immunity from state taxation is very strong and that the state interest in taxation is correspondingly weak. Accordingly, it is unnecessary to rebalance these interests in every case.

Cabazon Band, 480 U.S. at 215 n. 17.

In other words, it is not necessary to prove in each case that direct state taxation of Indians within Indian country will in fact interfere with reservation self-government in a tangible way. Direct state taxation of Indians within Indian country can be consistent with the plenary authority of the federal government over Indian affairs only if Congress has affirmatively and unmistakably authorized the state tax. *Id.*

The tax exemption recognized in *McClanahan* and *Blackfeet Tribe* derives from the special preemption standards that give effect to the plenary and exclusive power of the federal government to deal with Indian tribes and to protect Indians and their property from interference by the states. *Bryan*, 426 U.S. at 376 n. 2. Subjecting Indian tribes and tribal members to direct state taxation would have devastating impacts on tribal governments. *Id.* at 389 n. 14.

In the context of civil regulatory authority, the application of state law within Indian country does not offend federal law unless there is some interference with reservation self-government. Thus, each application of state law must be evaluated in a particular factual context in order to identify any potential interference with tribal self-government. *See Rice v. Rehner*, 463 U.S. 713, 719 (1983). The Court has expressly *rejected* the need for this case-by-case evaluation in the context of state taxation:

> In the area of state taxation, however, Chief Justice Marshall's observation that "the power to tax involves the power to destroy," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431, 4 L.Ed. 579 (1819), has counseled a more categorical approach: "[A]bsent cession of jurisdiction or other federal statutes permitting it," we have held, a State is without power to tax reservation lands and reservation Indians.

County of Yakima, 502 U.S. at 258, *quoting Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

The Commission concedes that states may not impose taxes directly on the United States, without regard to the ultimate economic burden of the tax. Pet. Br. at 31 n. 16. Yet it asks the Court to apply a less protective

standard of review on state attempts to impose taxes directly on Indian tribes and members. This Court has already rejected the idea proposed by the Commission. The decision in *Blackfeet Tribe* "turned on the rule that Indian tribes, like the Federal Government itself, are exempt from direct state taxation and that this exemption is 'lifted only when Congress has made its intention to do so unmistakably clear.' " *Cotton Petroleum*, 490 U.S. at 183 n. 14, quoting *Blackfeet Tribe*, 471 U.S. at 765. The same principles of federal supremacy that preclude direct state taxation of the United States preclude direct state taxation of Indian tribes and tribal members within Indian country.

The *per se* rule of *Blackfeet Tribe* has considerable practical justification as well. This Court has struggled over many years to develop a coherent doctrine defining the scope of the Indian immunity from state taxation, in the belief that "a well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area of the law for a number of years." *Colville*, 447 U.S. at 177 (Rehnquist, J., concurring). The requirement of unmistakable congressional authorization applied by the Tenth Circuit in this case is one of the few bright line standards in this area of the law. From the perspective of tax administration by the states and the perspective of business planning by the tribes, this bright line is both desirable and workable. The rule established by this Court provides a substantial level of predictability and certainty, and avoids the need for continuous and wasteful litigation.

Determining the legal incidence of a state tax will, in most cases, be much simpler than determining where the

ultimate economic burden of that tax may lie. For example, the Court held in *Blackfeet Tribe* that states may not impose severance taxes on a tribe's royalty interest in oil and gas, absent unmistakable congressional consent. The Commission would undermine that clear holding by permitting state taxation of a tribe's royalty interest if the tribe does not bear the economic burden of the tax. The Commission does not, however, suggest how economic burden is to be determined. Does the economic burden of a severance tax on coal fall on the mineral owner if market conditions allow some or all of the tax to be included in the price paid by a power plant which buys the coal? Similarly, does the economic burden of that same severance tax actually fall on the person who buys electricity from the utility that burned the coal, if an economist testifies that some or all of the severance tax is included in the utility's rates?

Who bears the legal incidence of a tax may not always be obvious but the vagaries of the market place are vastly more difficult to decipher. The rule proposed by the Commission would increase the level of uncertainty in this area of the law and diminish the central role of Congress in determining when a state may impose a tax directly on a tribe or tribal member for activity within Indian country.

The controlling effect of the legal incidence of a state tax under the *Blackfeet Tribe* principle also reflects the fact that taxes are not self-collecting. Taxes are typically enforced through civil and criminal proceedings against the taxpayer. This Court has noted the anomaly of a state claiming the authority to tax Indians within Indian country when the state has not been granted civil jurisdiction

over claims against Indians arising within Indian country. "Unless the state is willing to defend the position that it may constitutionally administer its tax system altogether without judicial intervention, the admitted absence of either civil or criminal jurisdiction would seem to dispose of the case." *McClanahan*, 411 U.S. at 179-180 (citation omitted). Oklahoma, like Arizona, has not obtained civil jurisdiction over Indians in Indian country pursuant to 28 U.S.C. § 1360. *See Sac and Fox*, 113 S. Ct. at 1992.

II. IF THE LEGAL INCIDENCE OF A STATE TAX FALLS ON NON-MEMBERS OF THE TRIBE, THE TAX IS NONETHELESS PREEMPTED IF THE STATE IS DIRECTLY TAXING "RESERVATION VALUE."

In the context of state taxation, the balancing of interests analysis applies only if the legal incidence of the state tax falls on a non-member of the tribe. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 144 (1980). A critical component of that balancing of interests is the concept of "reservation value." The Court has recently reaffirmed that state taxes which nominally fall on non-members of the tribe, but which implicate "value generated on the reservation by activities involving the Tribes," are markedly different from other state taxes which fall on non-members. *Milhelm Attea*, 114 S. Ct. at 2035.

States may validly impose a tax on non-Indian purchasers of goods which are merely imported by the tribe and resold within Indian country. *Colville*, 447 U.S. at

156-57. When, however, the state seeks to tax value generated within Indian country by activity in which the tribe plays a significant role, the balance shifts against state taxation, even if the tax nominally falls on a non-Indian. *Id.*; *Cabazon Band*, 480 U.S. at 216-21 (characterizing federal and tribal interests in establishing tribal gaming facilities as having "pre-emptive force"). Thus, in *Indian Country, U.S.A., Inc. v. Oklahoma Tax Comm'n*, 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988), the Tenth Circuit held Oklahoma could not impose its sales tax on the non-Indian customers of the Creek Nation's bingo enterprise. The Tenth Circuit correctly distinguished *Moe* and *Colville* on the grounds that those cases dealt with the sale of imported goods where the tribes had added no significant value to the goods. The court found that the activity being taxed by Oklahoma, *i.e.*, the entertainment offered by Creek Nation Bingo, was a "product" that was "wholly created, sold and consumed within the boundaries of Creek Nation lands." 829 F.2d at 986. Because the state sales tax was directed at "on-reservation value" the court held that Oklahoma could not impose its sales tax on the non-Indian customers of Creek Nation Bingo. 829 F.2d at 987.

Indian Country, U.S.A. relied heavily on this Court's decisions in *Colville* and *Cabazon Band* which protected reservation-generated value from state taxes and regulation. The Ninth Circuit has interpreted and applied *Colville* and *Cabazon Band* in the same manner as the Tenth Circuit. *See Gila River Indian Community v. Waddell*, 967 F.2d 1404, 1409-11 (9th Cir. 1992) (state taxes on a non-Indian company implicate reservation value where the tribe played an active role in developing, operating and

regulating a marina and related recreational facilities in conjunction with non-Indian partners).

In the present case, the Commission improperly attempts to apply the reservation value concept to a tax whose legal incidence is on the tribe. However, even if the legal incidence of the taxes here were on non-Indians, the Commission's application of the reservation value test is flawed in two basic respects. First, it argues the state is not taxing reservation value as long as the state spends its tax revenues outside of Indian country. Pet. Br. at 6, 13, 28. Second, the Commission argues that the existence of reservation value turns simply on whether a product purchased from a tribe within Indian country is subsequently exported from Indian country. Pet. Br. at 12, 27-28.

Where and how the state spends its tax revenues is simply not relevant to the issue of whether the tax is being imposed on reservation value. This Court developed the concept of reservation value as a way to determine whether the tribe is an active participant in creating the underlying economic value (apart from the value of any tax exemption) of the goods or services the state seeks to tax. Surely a state should not be permitted to support taxing value generated by the tribe within Indian country on the grounds that the state spends all of the collected taxes outside of Indian country.

Neither should use of a product outside of Indian country provide proof that the product does not constitute reservation value for the purposes of all possible taxes related to that product. For example, if a tribal enterprise manufactures and sells furniture within its reservation, that enterprise surely is generating reservation value. *See New Mexico v. Mescalero Apache Tribe*, 462

U.S. 324, 343 (1983); *Cabazon Band*, 480 U.S. at 219-20. The mere fact that a non-Indian who buys that furniture on the reservation from the tribal enterprise subsequently uses the furniture in his home off of the reservation should not justify a state tax on the on-reservation sale of the furniture. Whether the tax is imposed on the tribal seller or on the non-Indian buyer, the tax would be imposed directly on reservation value. In that circumstance, the rationale of *Cabazon Band* would preclude state taxation.

On the other hand, the reservation value concept would not preclude a state from applying a nondiscriminatory personal property tax to a person who bought furniture from the tribal enterprise and subsequently held it at a location outside of Indian country on the assessment date. Notwithstanding the arguments put forth by the Commission, the concept of reservation value requires careful analysis of precisely what the state is attempting to tax and whether the value of that taxable thing or event was generated within Indian country with the participation of the tribe. The mere fact that a product purchased within Indian country is subsequently used outside of Indian country does not concern the question of reservation value.

In the context of motor fuel taxes, the reservation value concept requires careful analysis of precisely what the state is taxing: manufacture of motor fuel, wholesale distribution of motor fuel, retail sale of motor fuel, consumer use of motor fuel, or some other event. The Tenth Circuit concluded that Oklahoma has chosen to tax the retail sale of motor fuel. The Tenth Circuit therefore correctly did not reach the question of reservation value,

because the legal incidence of the Oklahoma tax is on the tribe, not on a non-Indian. If this Court reverses the Tenth Circuit on the question of where the legal incidence of the state tax lies, the reservation value concept will be relevant to the extent non-members of the tribe buy motor fuel in Indian country, and will require a determination of whether a tax on that retail sales transaction amounts to a tax on value generated within Indian country. The mere fact that some or all of the fuel sold by the tribe at retail within Indian country is subsequently used outside of Indian country is irrelevant to whether the value of the activity the state chose to tax (the retail sale of motor fuel) was generated within Indian country. This Court should reject the Commission's attempt to ignore the significance of reservation-generated value simply because the product of reservation activity is used outside of Indian country.

III. THE HAYDEN-CARTWRIGHT ACT DOES NOT AUTHORIZE THE IMPOSITION OF ANY TAX ON AN INDIAN TRIBE.

A. The Applicability of the Hayden-Cartwright Act Was Not Raised Previously and Is Not Properly Before This Court.

The Commission failed to raise below the Hayden-Cartwright Act, *see* 31 F.3d at 972 n.4, and did not mention this law in its Petition for Writ of Certiorari. This Court has not decided the question of whether the Hayden-Cartwright Act even applies generally on Indian reservations, much less authorizes taxes to be imposed by states directly on Indian tribes or their enterprises.

Bracker, 448 U.S. at 151 n.16.[3] The question of whether the Hayden-Cartwright Act authorizes Oklahoma to impose its gasoline excise tax on the Chickasaw Nation is not properly before this Court, and should not be addressed in this proceeding. *See Benten v. Kessler*, 505 U.S. ___, 112 S. Ct. 2929 (1992) (*per curiam*); *Miree v. DeKalb County*, 433 U.S. 25, 33-34 (1977) (per Rehnquist, J.); *Hagen v. Utah*, 510 U.S. ___, 114 S. Ct. 958, 964-65 (1994).

B. The Hayden-Cartwright Act Expresses No Congressional Authorization for States to Tax Tribes or Tribal Members in Indian Country.

If the Court does consider the applicability of the Hayden-Cartwright Act here, it must reject the Commission's position. As shown above, a state may tax Indian tribes or tribal members operating in Indian country only if there is an "unmistakably clear" expression of congressional authority. *County of Yakima*, 502 U.S. at 258; *Blackfeet Tribe*, 471 U.S. at 765; *Bryan*, 426 U.S. at 375-76 & n.2. No such expression is found in the Hayden-Cartwright Act.

Section 10 of the Hayden-Cartwright Act, authorizing state taxation in federal reservations, does not mention state taxation of tribes, much less explicitly authorize it. *See* 4 U.S.C. § 104. Indian tribes are not mentioned once in that section or its legislative history. When Congress

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[3] The only reported case of the court of appeals that deals with this issue directly is *Marty Indian School Bd., Inc. v. South Dakota*, 824 F.2d 684, 688 (8th Cir. 1987) (holding that 4 U.S.C. § 104 "does not support the imposition of the state's motor fuel tax on the Marty Indian School," citing *Bracker*).

passed the Act in 1936, state tax laws could not reach reservation Indians as a matter of constitutional law. *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 18 L.Ed. 667 (1866); *see McClanahan*, 411 U.S. at 169.

The only statutory language in the Hayden-Cartwright Act that is even remotely relevant to state taxation of tribes are the phrases "military or other reservations" and "licensed traders." 4 U.S.C. § 104(a). Neither phrase provides anything close to an "unmistakably clear" expression by Congress that states may impose taxes on Indian *tribes*.[4] *See Bryan*, 426 U.S. at 381 (A statute granting civil jurisdiction to the States in Indian country does not allow states to tax Indian property in light of the "total absence of mention or discussion

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[4] The two administrative opinions relied on by the Commission do not address the issue of whether the Hayden-Cartwright Act subjects tribes to state taxes, and could not supply the "unmistakably clear" statutory language even if they had. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 768 n.7 (1985). There is no evidence that these obscure opinions were brought to the attention of Congress, at any rate, and Congress' failure to amend the act in response to them has no persuasive value. *See generally United States v. Board of Comm'rs of Sheffield County, Alabama*, 435 U.S. 110, 134-35 (1978) ("When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation . . . [However,] it is impermissible to draw inferences of approval from the unexplained inaction of Congress . . . ."). *Cf. Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. ___, 114 S. Ct. 1439, 1452-53 (1994) (refusing to impute congressional acquiescence in judicial construction of provision of securities laws by Congress' failure to amend provision in securities law while amending the securities laws in other respects, although all eleven of the courts of appeals had embraced that construction).

regarding a congressional intent to confer upon the States an authority to tax Indians or Indian property on reservations."); *Blackfeet Tribe*, 471 U.S. at 766-67 (State taxation of tribe's royalty share of oil and gas is not authorized by 1938 act of Congress, where "[n]othing in either the text or legislative history of the 1938 Act suggests that Congress intended to permit States to tax tribal royalty income generated by leases issued pursuant to that Act. The statute contains no explicit consent to state taxation [of Indian tribes]."); *County of Yakima*, 502 U.S. at 267-70 (In light of principles of statutory construction "deeply rooted in this Court's Indian jurisprudence," the Court rejects a construction of the Burke Act, allowing state "taxation of . . . land" after the trust period expired, to also authorize taxation of the proceeds from the sale of that land.).

In this case, of course, the Hayden-Cartwright Act does not even suggest that states may tax tribes, and, indeed, there is ample reason to believe that Congress did not intend to include nontaxable Indian lands as within the statute. *See Bracker*, 448 U.S. at 151 n.16. However, even if there were some ambiguity in the legislation, this case is a most appropriate one for application of the canons of statutory construction that favor tribal tax immunities and that have near constitutional force. *See Blackfeet Tribe*, 471 U.S. at 766; Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 412-17 (1993).

The text of 4 U.S.C. § 104 makes clear that Congress was concerned with motor fuel sales by federal agencies to federal employees and to the general public for their

private use. Congress intended to preclude the argument that motor fuel was beyond a state's taxing authority simply because it was purchased from a federal agency at a location within a federal reservation. There is no indication in the language of the statute or in its legislative history that Congress also intended to remove obstacles to state taxation that were based on considerations other than the federal governmental status of the seller. When the obstacle to state taxation is based on some other factor, such as the Indian status of the seller or the purchaser of the fuel, the Hayden-Cartwright Act simply has no application. The legislative history and related legislation discussed below demonstrate that to the extent Congress gave any thought at all to "licensed traders" the concern was sales by non-Indian traders to non-Indian customers from outside the reservation.

In other sections of the Hayden-Cartwright Act, Congress distinguished "nontaxable Indian lands" from "other Federal reservations" and dealt with them separately. Act of June 16, 1936, ch. 582, §§ 3, 6, 49 Stat. 1519, 1520-21. Hearings on the bill support the view that Indian lands were not within the purview of section 10 of that bill, which became 4 U.S.C. § 104.[5] That section was plainly directed at federal agencies and licensees, requiring "the officer in charge of such reservation" to submit

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[5] *See, e.g., Hearings Before the House Comm. on Roads on H.R. 11687,* 74th Cong., 2d Sess. 118 (1936) (Representative Whittington argues that sections of the bill appropriating money for roads on Indian reservations should not be included, as follows: "I have no sort of disposition not to want to help out on Indian work; but this bill deals primarily with the public roads, in every State in the Union. It deals with highways.").

reports showing "motor fuel not sold for the exclusive use of the United States." *Id.*, § 10(b), 49 Stat. at 1522.

Subsequent amendments to section 10 of the Hayden-Cartwright Act confirm the view that it was intended to apply to purely federal agencies and licensees, but not to Indians doing business in Indian country. The legislative history of the Buck Act, which continued tax exemptions for tribal Indians and made minor changes to section 10 of the Hayden-Cartwright Act, shows Congress' clear understanding that Indians and Indian tribes were generally exempt from *all* state taxes.

Indians and Indian lands were not mentioned in the original Buck Act bill, H.R. 6687. 84 Cong. Rec. 10,094 (1939). The bill did contain the phrase – as did the Hayden-Cartwright Act – "military and other reservations." *Id.* Even so, the bill was *not* intended to include Indian reservations.

> The bill presents a serious question as to whether it would authorize the levy of State sales and other taxes on transactions within Indian reservations. *We have been advised by the office of the Senate legislative counsel that it is not intended to apply to such transactions and will not be so construed.*

Letter from Acting Secretary of the Interior to Hon. Pat Harrison (Aug. 1, 1939), *reprinted in* 84 Cong. Rec. 10,685 (1939) (emphasis added). Nonetheless, the Department of the Interior sought to avoid any possibility that the legislation would be misconstrued, and sought to exclude

explicitly "Indian reservations" from the coverage of the bill.[6] *Id.* Senator LaFollette proposed such an amendment. 84 Cong. Rec. 10,907 (1939) (proposing an amendment to exempt "any transaction occurring in whole or in part within an Indian reservation").

In hearings on H.R. 6687, New Mexico objected to Senator LaFollette's proposed amendment. *Hearing Before a Subcomm. of the Senate Comm. on Finance on H.R. 6687*, 76th Cong., 3d Sess. 2 (1940) ("*Hearing*"). The objection, however, sought in no way to abrogate the historic tax immunities of Indians and Indian tribes, but to prevent *non-Indians* from moving their stores to Indian lands to avoid state taxes. *Id.* at 19. New Mexico Representative Dempsey, on behalf of the New Mexico Governor, readily acknowledged that Indians were "exempt from taxation" and that New Mexico had "no objection whatsoever to prohibiting the sales tax applying to Indians." *Id.*

The Interior Department continued to seek a blanket "reservation" exemption which would have applied to both non-Indian and Indian vendors and consumers. *Id.* at 38-40. Senator George suggested that the Interior officials confer with the State authorities to arrive at acceptable language. *Id.* at 40. The Committee ultimately reported out the bill with language consistent with New Mexico's position, as urged by Representative Dempsey,

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[6] Between 1936, when the Hayden-Cartwright Act was passed, and 1939, when the Buck Act bill was introduced, the "federal instrumentality" doctrine for nontaxable Indian lands was put in doubt by *Helvering v. Mountain Producers Corp.*, 303 U.S. 376 (1938). *See Felix S. Cohen's Handbook of Federal Indian Law* 421 n.145 (R. Strickland ed. 1982).

that "any tax on or from any Indian not otherwise taxed" would continue to be preempted. S. Rep. No. 1625, 76th Cong., 3d Sess. 4 (1940). The Committee amendment was enacted *verbatim* and is codified at 4 U.S.C. § 109.[7]

Nothing in the Buck Act or its legislative history even remotely suggests that Congress was jealously protecting the tax immunities of tribal Indians in only a limited way. To the contrary, Congress was continuing "[t]he policy of leaving Indians free from state jurisdiction and control," a policy "deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945).

Moreover, it is clear that Congress understood that the Buck Act's tax exemptions for tribal Indians in Indian country were coextensive with those of the earlier Hayden-Cartwright Act, where Indians are not even mentioned. This closely related legislation should be read *in pari materia*. *See McClanahan*, 411 U.S. at 176 (characterizing 4 U.S.C. § 104 as part of the Buck Act); *see generally Kokoszka v. Belford*, 417 U.S. 642, 650 (1974).

As Representative Buck stated, his bill was

> intended to provide that sales made within the Federal area shall be subject to the State sales taxes. We have already specifically granted the privilege to a State to tax gasoline sold within those areas, and it is proposed to extend this privilege to other sales.

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[7] Section 5 of the Buck Act, as signed into law, read "Nothing in sections 1 and 2 of this act shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed." Act of Oct. 9, 1940, ch. 787, 54 Stat. 1059, 1060.

84 Cong. Rec. 10,093-94 (1939). In subsequent hearings, Representative Buck reiterated the intent of the legislation, stating "under section 10 of the Hayden-Cartwright Act, provision was made for the collection of motor-vehicle-fuel taxes within the federal reservations, and really this [bill] is only an extension of the principle involved in that act . . . ." *Hearing* at 4. Amendments to the Buck Act bill were justified "so that the authority granted to the States by [section 10 of the Hayden-Cartwright Act, 4 U.S.C. § 104] will more nearly conform to the authority granted to them under section 1 of this act." S. Rep. No. 1625, 76th Cong. 3d Sess. 5 (1940).

Clearly, Congress had no desire to differentiate between the treatment of sales taxes under the Buck Act from that of fuel taxes under the Hayden-Cartwright Act. Rather, Congress attempted to make the exemptions totally consistent, and all of the legislative materials show that the unstated assumption in 1936 that states could not tax Indians in Indian country was explicitly expressed in the Buck Act in 1940. The sole concern related to "licensed traders" was the evasion of state taxes by non-Indian vendors.

In the original drafting of the Buck Act, Indian reservations and other nontaxable Indian lands were simply assumed not to be within the "other reservations" with which the bill was concerned. *See* discussion *supra* at 19-20. Although the phrase "licensed traders" appeared in the Hayden-Cartwright Act, Congress knew that all of these people were non-Indians, and simply foreclosed a potential loophole by which *non-Indians* could move their businesses to Indian country and, by that simple expedient, avoid lawful state taxes. *See Hearing* at 19:

Mr. Dempsey. * * *

As I say, we have no desire to tax the Indians. They are exempt from taxation in our State, but we do not believe that because a man establishes a store on Indian lands competing with a store outside, the store inside should be exempt from all taxation, and the store outside should pay.

Senator Brown. Does the Indian who runs a store pay taxes?

Mr. Dempsey. The Indian does not run the store. The proprietors of the stores are whites, and not Indians . . . *I do not know of a single instance of an Indian owner of a store on an Indian reservation.*

Senator Brown. But if he did run a store, he would be subject to the same sales tax as levied by the State upon a white storekeeper?

Mr. Dempsey. *If an Indian operated a store outside of the reservation he would then be required to pay the sales tax, which is 2 percent, as are all other owners of stores in New Mexico. If, however, he has a store on Indian land, notwithstanding that he can sell anything in that store that he desires to sell, not Indian crafts, but foodstuffs, or anything of that kind, he is exempt.*

Senator Brown. *On sales to anybody?*

Mr. Dempsey. *To anybody.*[8]

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[8] As noted above, it was Representative Dempsey's position on the Indian tax exemptions that was ultimately embraced in the Buck Act.

Id. (emphasis added) The fact that 4 U.S.C. § 109 explicitly exempts "Indians not otherwise taxed"[9] only from what is now 4 U.S.C. §§ 105-106 (and not 4 U.S.C. § 104) is not the product of any congressional design, but only a result of "literal reenactment of the code," as the Legislative Reference Service of the Library of Congress took pains to point out in the codification of Title 4 of the United States Code. *See* S. Rep. No. 659, 80th Cong., 1st Sess. 9 (1947):

> One matter, however, might be noted. Section 108 of H.R. 1566 insures the retention of jurisdiction of the United States over Federal areas affected by the provisions in sections 105-110 dealing with State and Federal taxation in such areas. Section 109 provides that nothing in certain stated provisions permitting taxation in such areas shall be construed to authorize the collection of taxes from Indians not otherwise taxed. Section 110 defines certain terms with respect to the same problem of taxation. Section 108, however, refers only to sections 105-110; section 109 refers only to sections 105, 106; and section 110 refers only to sections 105-109. Yet section 104 deals also with gasoline taxes in Federal areas. Consequently the enactment into positive law of these various provisions could perhaps give rise to the contention that the exclusion of section 104 from the provisions of sections 108, 109, and 110 had some purpose not actually intended. This ambiguity is the result of the literal reenactment of the code.

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[9] In 1934, the phrase "Indians not taxed" was understood to mean "Indians resident on reservations, that is, on land not taxed by the state." William G. Rice, Jr., *The Position of the American Indian in the United States*, 16 J. of Soc. of Comp. Leg. (3d ser.) 78 (1934).

Reports explaining subsequent amendments to the Hayden-Cartwright Act tend to confirm the view that it was intended to apply not to nontaxable Indian land, but to purely federal enclaves. *See* H.R. Rep. No. 2515, 84th Cong., 2d Sess. 1 (1956) (4 U.S.C. § 104 "provides that taxes levied by the States and Territories on sales of gasoline may be levied with respect to such sales made by post exchanges, commissaries, and similar outlets located on Federal military reservations . . . ."); H.R. Rep. No. 2695, 84th Cong., 2d Sess. 1 (1956) (legislation to amend 4 U.S.C. § 104 would place "Guam on a basis of equality with the States and Alaska and Hawaii in authorizing the government of Guam to collect gasoline taxes on motor fuel sold on military posts, PX's and the like for nonmilitary use.").

The Hayden-Cartwright Act was never intended to abrogate the historic tax immunities enjoyed by Indians in their Indian country. It certainly does not provide "unmistakably clear" language showing a congressional intent to do so.[10]

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[10] It would be most ironic if the Hayden-Cartwright Act were used to justify state taxes in Chickasaw (or, for that matter, Navajo) country. That act sought to establish a federal/state partnership in road construction and maintenance, and assumed that states would expend the taxes allowed under the act throughout the state. It followed an earlier (1934) Hayden-Cartwright Act that sought to prevent states from diverting highway funds to other uses. Act of June 18, 1934, ch. 586, 48 Stat. 993. Here, by contrast, "*[a]ll* of the road mileage maintained by the state is off Indian country." Pet. Br. at 28 (emphasis added), quoting factual findings made by the District Court.

CONCLUSION

The policy of leaving Indian tribes and tribal members free from state jurisdiction and control was not breached by Congress in the Buck Act or the Hayden-Cartwright Act. This historic policy and the clear statement rule effectuating it are grounded firmly in the Constitution. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 408-17 (1993). Thus, even if Indian tax exemptions might "possibly embarrass the finances of a state or one of its subdivisions," that is a matter "for consideration of Congress, not the courts." *Board of Comm'rs of Creek County v. Seber*, 318 U.S. 705, 718 (1943). *See Marshalling Past and Present*, 107 Harv. L. Rev. at 428.

The attempt by the Commission to have this Court stray from the constitutional foundations of its Indian jurisprudence is particularly unappealing in this case, since not even an act of Congress is required to solve its perceived problem. All Oklahoma needs to do is clarify its tax laws in minor ways.

The Court of Appeals properly recognized the structural and constitutional values at stake here. It properly respected the "tradition of Indian sovereignty." 31 F.3d at 972. If, indeed, the legal incidence of the Oklahoma's tax is on a tribal entity, the taxes are preempted. If it is not, the case should be remanded with instructions to determine if the Chickasaw Nation is merely marketing a tax exemption or is creating and marketing reservation-generated value.

Because of the deference properly afforded to the construction of state statutes by the courts of appeals and because the Tenth Circuit reasonably construed Oklahoma's tax laws as being imposed on the tribal retailer, the decision below should be affirmed.

Respectfully submitted,

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October Term, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

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To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF SAC AND FOX NATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF OF SAC AND FOX NATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Pursuant to Supreme Court Rule 37, the Sac and Fox Nation, (hereinafter referred to as "The Nation"), files this brief amicus curiae on the side of respondent and in opposition to the petitioner in this case. Both respondent and the petitioner have consented to the filing of this brief of *amicus curiae*.

The Nation is a federally recognized Indian tribe with an established, well organized tribal government, with long-standing treaty relationships with the United States. Petitioner challenges the decision below by contending that Oklahoma may tax transactions within Indian country of the Chickasaw involving the Chickasaw's members. Such a ruling is argued to mean that the Nation and its members are subject to virtually total state authority and control on all Indian-owned lands restricted against alienation by federal law. A holding

by this Court in favor of petitioner on these grounds would have a devastating impact on the Nation and its members, for it would deprive the Tribes of many traditionally exercised governmental authorities, most particularly the ability to raise revenue to fund operations.

The Tribes governmental interest are vital. The Nation submits the attached brief to show that the jurisdictional status of Indian owned restricted lands resides with the Tribal and Federal government. The Nation also wishes to address the history of decisions by this Court and the lower federal and state courts precluding state jurisdiction, and upholding federal and tribal jurisdiction, over Indian lands in Oklahoma, including allotments, reserved lands and subsequently acquired lands. Both Congressional policy, and the consistency of federal and state court decisions upholding federal jurisdiction and denying state authority serve as reason for this Court to affirm the decision of the Court of Appeals for the Tenth Circuit.

INTEREST OF AMICUS CURIAE

The Nation is a federally-recognized Indian tribe, having a well-organized tribal government with a continuous treaty relationship with the United States, which began in the earliest years of the Republic. The governmental authority of the Nation would be seriously compromised if the Court were to rule favorably on the contentions presented by petitioner. The Nation has a vital interest in protecting its governmental authority, and the corresponding exemption from state jurisdiction. This authority and exemption is currently the subject of ongoing litigation following this Court's decision in *Oklahoma Tax Commission v. Sac and Fox Nation*, 113 S.Ct. 1985 (1993) (*hereinafter Sac and Fox Nation*).

The Nation administers its own tribal court supported by Bureau of Indian Affairs grants and contracts, tribal tax revenues, and tribal funds. The Nation is organized with a written constitution approved by the Secretary of the Interior pursuant to the Oklahoma Indian Welfare Act of June 26, 1936,

49 Stat. 1967 (25 U.S.C. §503) (*hereinafter* O.I.W.A.). The Nation has also incorporated the provisions of the Act of June 18, 1934, 48 Stat. 984 (25 U.S.C. §461 *et seq.*) (Indian Reorganization Act) with Secretarial approval.

Pursuant to these fundamental foundations, the Nation has enacted, and enforced, a myriad of statutes which regulate the conduct of all persons within the Indian country subject to the jurisdiction of the Nation. The laws enacted by the Nation include provisions authorizing the incorporation of business and non-profit corporations, removal or discipline of elected tribal officials, the regulation of the gaming industry, regulation of the mineral mining industry including oil and gas mining, regulating security agreements and the filing and enforcement of liens, provisions for the levy and collection of tribal taxes including taxes on all forms of tobacco and motor fuels, regulation of certain industries, provisions providing for public health facilities and public housing, provisions defining the punishment for criminal offenses and providing for police and fire protection, as well as provisions for complete trial and appellate court systems with what is believed to be model tribal laws relating to tribal courts, civil, criminal, appellate, and juvenile procedure, and rules of evidence. Interpreters are provided in the tribal court when needed.

In addition to these statutory enactments, the courts of the Nation enforce tribal traditions and customs as the common law of the tribe in a manner similar to that in which American customs and traditions are enforced as the common law in state and federal courts. Actions relating to marriage, divorce, child custody, guardianships, probate of estates, contract rights, tortious conduct, and requests for relief in equity are not uncommon.

These laws are enforced within the Indian country of the Nation. This consists, at a minimum, of the trust or allotments and lands owned by the tribe reserved from allotment or acquired in trust by the United States or restricted against alienation by the United States pursuant to Acts of Congress, 25 U.S.C. §§177, 335, 465, 501. The Nation maintains the

position that its original reservation boundaries were not disestablished, or that at worst, the reservation was diminished but not disestablished in the allotment process. This question has not yet been authoritatively determined under the modern definition of Indian country, or the modern test for reservation disestablishment or diminishment as adopted by this Court in response to the enactment of 18 U.S.C. §1151.

The Nation has a direct interest in the outcome of this action insofar as the Oklahoma Tax Commission requests this Court to render a decision judicially allowing taxation of recognized tribal governments, tribal members, and Indian country without Congressional sanction which will directly effect the Nation's current federal district court litigation on remand from *Sac and Fox Nation, supra.*

SUMMARY OF ARGUMENT

1. Oklahoma may not tax Indian tribes for their sales of fuel within their Indian country. Both of the separate, but related, doctrines of pre-emption and infringement prohibit the tax at issue. Additionally, the Hayden-Cartwright Act, which was not addressed below, does not overcome the barrier against state taxation of Indians or Indian Tribes.

2. The State of Oklahoma has never had authority to tax Indian income within the territory of the Chickasaw Nation. Both the statutes creating the State of Oklahoma and the Treaty of Dancing Rabbit Creek recognized the prohibition of Oklahoma authority in the Chickasaw's Indian country.

3. Recent Congressional action underscores the legislative branch's policy prohibiting state interference in the Indian country. Thus, not only is Oklahoma prohibited from taxing Indians or Indian Tribes within the Chicksaw's territory, the Court should reconsider its recent policies regarding state jurisdiction over both non-member Indians and non-Indians.

ARGUMENT

I. OKLAHOMA MAY NOT APPLY ITS FUEL TAX AGAINST INDIAN TRIBES

The Petitioner argues that it has the ability to tax fuels sold by the Chickasaw. It does this through two mechanisms; first, that the state suffers harm by Tribal sales of gas without the State sales tax attached. Secondly, that the legal incidence of the tax is irrelevant to the state's ability to tax fuel sales within the jurisdiction of the Indian Tribes. Both arguments must fail when viewed against the long established jurisprudence of this Court in the special area of Indian Taxation.

A. OKLAHOMA CANNOT TAX THE SALE OF FUEL BY THE CHICKASAW NATION BECAUSE CONGRESS HAS NEVER DISSOLVED THE FEDERAL PRE-EMPTION BARRIER TO STATE JURISDICTION.

The Oklahoma Tax Commission would have the Court believe that this controversy is solely one of State vs. Tribal authority. In 1948, Congress codified the Supreme Courts existing common law classifications of Indian Country by the Act of June 25, 1948, 62 Stat. 757, codified in its present form at 18 U.S.C. §1151, which states:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Oklahoma was not excepted from the terms of this Act. This Court, while often speaking in terms of "reservation" or "allotment" or "dependent Indian community" as relevant in a particular circumstance has, since 1948, clearly held that "Indian country" is the legally recognized term of art defining the territorial area for the exercise of tribal self-government and federal supervision. *Sac and Fox Nation, supra. See also, United States v. Mazurie,* 419 U.S. 544 (1975); *DeCoteau v. District Court,* 420 U.S. 425 (1975)[1]; *United States v. John,* 437 U.S. 634 (1978); *Solem v. Bartlett,* 465 U.S. 463 (1984)[2]. In truth, Indian country is a question of the authority of the Federal government vis-a-vis the State.

Article I, Section 8, Clause 3 of the Constitution of the United States vests the sole power to control commerce between citizens or subjects of the United States and the Indian Tribes exclusively in the Congress of the United

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[1] In footnote 2 of the opinion, the Court stated: "If the lands in question are within a continuing 'reservation'; jurisdiction is in the tribe and the Federal Government "notwithstanding the issuance of any patent . . . . On the other hand, if the lands are not within a continuing reservation, jurisdiction is in the State, except for those land parcels which are 'Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.' While §1151 is concerned on its face, only with criminal jurisdiction, the Court has recognized that it generally applies as well to questions of civil jurisdiction." (citations omitted). After concluding that the Sisseton-Wahpeton reservation had been disestablished, the Court concluded: "In such a situation, exclusive tribal and federal jurisdiction is limited to the retained allotments. 18 U.S.C. §1151(c)." *Id.* at 446.

[2] In footnote 8 at page 467 of the opinion of the Court stated: "Regardless of whether the original reservation was diminished, federal and tribal courts have exclusive jurisdiction over those portions of the opened lands that were and have remained Indian allotments. In addition, opened lands that have been restored to reservation status by subsequent Acts of congress fall within the exclusive criminal jurisdiction of federal and tribal courts." (citations omitted).

States. The founding fathers explained their reasons for vesting such authority exclusively in Congress instead of a sharing arrangement with the States – as had been the case under the Articles of Confederation – in the following manner:

> [T]he prospect of present loss or advantage, may often tempt the governing party in one or two States to swerve from good faith and justice; but those temptations not reaching the other States, and consequently having little or no influence on the national government, the temptation will be fruitless, and good faith and justice be preserved. . . . Not a single Indian war has yet been occasioned by the aggressions of the present Federal Government, feeble as it is, but there are several instances of Indian hostilities having been provoked by the improper conduct of individual States . . .

See, The Federalist No. 3, pp. 43-44 (C. Rossiter ed. 1961) (NAL Penguin, Inc. Publisher) and further:

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State is not yet settled, and has been a question of frequent perplexity and contention in the federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the Articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a

> mathematical axion by taking away a part and letting the whole remain.

See, The Federalist No. 42, pp. 268-269 (C. Rossiter, ed. 1961) (NAL Penguin, Inc. Publisher).

Far from allowing the situation occasioned by the Articles of Confederation to remain, the Constitutional Convention intentionally framed the Commerce Clause to remove from the States all authority concerning commerce with the Indian Tribes by non-Indians. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

In *Kennerly v. District Court*, 400 U.S. 424 (1971), the Court recognized that Public Law 83-280, 28 U.S.C. §1360 as amended by 25 U.S.C. §1322 was a "governing Act of Congress" concerning state authority to regulate matters involving Indians in the Indian Country thereby precluding reliance on an "infringement test" or application of a balancing test. Simply stated, Congress intended that States comply with this act in order to acquire jurisdiction over commerce with Indians in the Indian Country.

> Examination of the Federal statutes and State Constitutions have revealed that enabling acts for eight States, and in consequence the constitutions of those States, contain express disclaimers of jurisdiction. Included are . . . Oklahoma. . . . *Effect of the disclaimer of jurisdiction over Indian land within the borders of these States* – in the absence of consent being given for future action to assume jurisdiction – *is to retain exclusive Federal jurisdiction until Indian title to such lands is extinguished.* (emphasis added).

S. Rep. No. 699, 83rd Cong., 1st Sess., 1953 U.S. Code Congressional and Administrative News 2409, 2412 (legislative history).

This statute, commonly referred to as P.L. 83-280, expressly extends the civil and criminal laws having general application to all persons and property within the State into the Indian Country within the states subject thereto, with

certain limitations as to the application thereof to Indians of the affected Indian Country. This statute, then, is the sole Congressionally authorized general mechanism for states to exert authority over commerce with Indians in the Indian Country.

It is absolutely clear that with rare exception Congress has not allowed the taxation of Indians in "Indian Country" by a state. *Montana v. Blackfeet*, 471 U.S. 759 (1985); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982). Nor may a state generally tax Indians in "Indian Country" even if a state has assumed criminal and civil jurisdiction over "Indian Country". *Bryan v. Itasca County, Minnesota*, 426 U.S. 373 (1976). The Court has recently held, however, that a state may tax non-Indians in "Indian Country" if the tax burden does not frustrate tribal self-government or federal policy. *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

In *Moe* and *Washington v. Confederated Tribes of the Colville Reservation*, 447 U.S. 134 (1980) the Court allowed a tax on non-Indians. This Court held that the tax was on non-Indians and thus did not frustrate tribal self-government and was not prohibited by the federal preemption barrier. The Oklahoma Tax Commission differs from *Moe* and *Colville* because the Tax Commission has taxed the tribe directly. The Tenth Circuit correctly held that the incidence of the fuel tax fell upon the Indian retailer. *Colville, id.*, allowed the state tax because the first taxable event was the use, consumption or possession by the non-Indian. *Id.*, at 142, footnote 9. *Moe* likewise contains a specific statute that the tax "shall be conclusively presumed to be [a] direct [tax] on the retail consumer." *Moe*, 425 U.S., at 482. The Oklahoma Motor Fuel Tax code contains no such clear placement of the tax upon the

retailer. To the contrary, it specifically states that the distributor collects the tax "on behalf of a licensed retailer." 68 Okla. Stat. §505C.

B. THE STATE IS WITHOUT AUTHORITY TO TAX BECAUSE OF INTERFERENCE WITH TRIBAL SELF-GOVERNMENT.

The federal government maintains a federal policy encouraging Indian economic development and tribal self-government. If the tribal businesses must pay both state and tribal taxes on top of federal taxes, the Court will create an unlevel playing field in favor of the State. Economic development in Indian Country would be devastated or eliminated altogether by having to pay triple taxation, or the Tribal government will have to forego sorely needed tax revenues and its ability to exercise its governmental functions by creating a legal infrastructure within which to conduct trade and other business. *Bryan v. Itasca County, Minnesota*, 426 U.S. 373, 388 (1976) noted the destructive effect of allowing the tribe to be subject to state and local tax.

State taxes would limit the tribes ability to raise and maximize tribal revenues, to determine whether to make certain property or transactions tax exempt, or to limit taxation of certain property or businesses in order to encourage economic development, all of which would directly infringe on their ability to govern their own affairs.[3] Such taxes also frustrate federal efforts to aid Indian Country. Congress annually appropriate approximately one billion dollars a year for Federal Indian programs. Yet almost half of this, $500 million, is then immediately pulled back out of Indian Country through federal and state taxes. *Id.* note 9, p. 188.

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[3] *See State and Indian Tribal Taxation on Indian Reservations – Is It Too Taxing?*, 1989 Harvard Law Symposium, Susan Williams and Keven Gover, pp. 180-181 (1990, President and Fellows of Harvard College).

The Oklahoma Tax Commission's attempt in this case to assess the Chickasaw Fuel taxes is substantively and procedurally defective. The State of Oklahoma has neither civil nor criminal jurisdiction within Indian Country. *Housing Authority of the Seminole Nation v. Harjo,* 790 P.2d 1098 (Okla. 1990), *Ahboah v. Housing Authority of the Kiowa Tribe of Indians,* 660 P.2d 625 (Okla. 1983). It is absolutely inconceivable that Congress would allow any significant state taxation in areas where the tribes are responsible for both civil and criminal jurisdiction. Furthermore, the responsibility of exercising civil jurisdiction carries with it the responsibility of regulating interaction with both Indian and non-Indian.

The Chickasaw, unlike any state government, are asked to exercise criminal and civil jurisdiction while having tax monies drained by both the federal and state taxing authorities. The State of Oklahoma has revenues drained from only one authority (federal), while tribal governments are responsible for both civil and criminal jurisdiction in the Indian Country within the State. Thus state taxation within "Indian Country" located in Oklahoma has not been allowed or authorized by Congress.

A key consideration in determining the authority of a state to tax within "Indian country" is whether the state has civil and criminal jurisdiction. In *McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164 (1973), the Court, in dealing with such a situation, explained:

> . . . a startling aspect of this case is that appellee apparently concedes that, in the absence of compliance with 25 U.S.C. 1322(a), the Arizona courts can exercise neither civil nor criminal jurisdiction over reservation Indians . . . *But the appellee nowhere explains how, without such jurisdiction, the State's tax may either be imposed or collected* . . . Unless the State is willing to defend the position that it may constitutionally administer its tax system altogether without judicial intervention . . . the admitted absence of either civil or criminal jurisdiction

> would seem to dispose of the case. (Emphasis added).

McClanahan, 411 U.S. at 178-179. Indeed, conferring civil and criminal jurisdiction upon a state may still leave the state without taxing authority over Indians in "Indian country". *Bryan v. Itasca County*, 426 U.S. 373 (1976). But there has never been any case which has held that a state may tax Indians within any part of "Indian Country" where that state has no general civil or criminal jurisdiction unless Congress has specifically legislated to grant the states taxing power.

Neither *Moe* nor *Colville* involved tribes which provided services to the taxpayers. But in Oklahoma the Indian Tribes provide the protection of civil laws to all individuals doing business within their jurisdiction. This protection and exercise of jurisdiction extends to both Indian and non-Indian alike.

The Oklahoma Indian Welfare Act restores the Indian Tribes in Oklahoma to their original exclusive jurisdiction over those transactions occurring within their country to the exclusion of the state. At a minimum the O.I.W.A. requires the state to show an affirmative subsequent Congressional delegation of authority to the state to enter the Indian Country within Oklahoma. The state has yet to show that it has received such a Congressional grant of power, except for the discredited reliance on the Enabling Act. In other words, prior to the creation of the State of Oklahoma, the Chickasaw and Amicus exercised undiminished and exclusive authority in civil matters arising in their country for the simple reason that no state existed to challenge that authority. Given the prohibition against assertion of state jurisdiction imposed by the Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 267 and the failure of the Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 267 and the failure of the Oklahoma Tax Commission to show any explicit general Congressional grant of authority to tax or regulate trade with the Indians since statehood in 1907, the State's position must fail.

C. THE HAYDEN-CARTWRIGHT ACT DOES NOT AUTHORIZE TAXATION WITHIN THE INDIAN COUNTRY OF THE CHICKASAW NATION.

Petitioner also relies upon the passage of the Hayden Cartwright Act, Section 10, Act of June 16, 1936, codified at 4 U.S.C. §104 as a basis for its ability to tax fuel sales within the Indian Country of the Chickasaw. While Amicus believes this is not properly before the Court as it was not briefed by the parties below, nor formed a basis for the circuit opinion, the brief of Amicus States went at length into the Act. Therefore, Amicus Sac and Fox Nation believes that at a minimum the Court should be aware that the Act does not apply to the Chickasaws.

The Hayden-Cartwright Act was enacted on June 16, 1936. It contained needed appropriations and amendments for the Federal Aid Highway Act. The particular provision that is addressed by Amicus States is codified at 4 U.S.C. §104(a):

> All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.

The States and Petitioner have seized upon the use of the term "military or other reservations" as proof that the state may tax the Indian Country of the Chickasaw. There are two primary flaws with arguing that this provision creates a fulcrum that overcomes the presumption against state taxation of

Indian tribes. First, as before stated, is the requirement that taxation laws must be evidenced by clear congressional statements. Second, in order for this specific provision to apply to the Chickasaw, and thus to other Tribes in Oklahoma, there must be a reservation. Each of these points will be addressed in turn.

(a) In the field of Indian law special canons of construction apply to statutory interpretation. *Felix S. Cohen's Handbook of Federal Indian Law* (1982 ed.) (*hereinafter Cohen's*) explains that "generally they provide for broad construction when the issue is whether Indian rights are reserved or established, and for narrow construction when Indian rights are to be abrogated or limited." *Cohen's supra*, at 225 (1982 ed.) In order for a statute to take away sovereign rights of a tribe, this Court has required that clear and unambiguous language be used. Additionally it must be shown that Congress considered the consequences of its action as regards to the effect upon Indians and Indian tribes. *See United States v. Dion*, 476 U.S. 724 (1986) (discussing the abrogation of treaty hunting of eagles by the Endangered Species Act.)

Both the Petitioner and Amicus States refer to two Opinions that state that the Act applies to tribes, *Application of Federal and State Sales Taxes to Activities of Minominee Mills*, 57 Interior Dec. 129 (1940) and 38 Opinion of the Attorney General 522, (1936). However, these two opinions also failed to consider the unique statutory construction that comes into play regarding Indian tribes. The Opinions cited by Petitioner fail to do so. While noting the existence of these opinions, the Revised *Felix S. Cohen's Handbook of Federal Indian Law* (1982 ed.) explains:

> In passing this statute Congress did not consider its possible application to transactions involving reservation Indians. The tax authorization was first passed as part of a 1936 highway construction statute, and other sections of the Act refer to Indian reservation roads. Act of June 16, 1936, ch. 582, Sections 3, 6, 49 Stat. 1519, 1520, 1521. But the tax

> authorization was not part of the initial bill that passed the House and cleared the appropriate Senate committee. H.R. 11687, 74 Cong., 2d Sess (1936). *See* 80 Cong.Rec. 5613, 6408 (1936). Thus, the committee reports make no reference to it. H.R. Rep. No. 2371, 74th Cong., 2d Sess. (1936); S. Rep. No. 1967, 74th Cong., 2d Sess. (1936). A separate bill proposing the tax authorization had been introduced in the House. H.R. 3660, 74th Cong., 2d Sess. (1936). When the highway bill came before the full Senate, the provisions of H.R. 3660 were added as a floor amendment. 80 Cong. Rec. 6913 (1936). There is no separately published history on H.R. 3660, and the subsequent Conference Report on the amended highway bill added no explanation of the tax provision. H.R. Rep. No. 2902, 74th Cong., 2d Sess. 1 (1936). During final debate, a House member described the tax section as dealing with a problem in "post-exchange stores and on Government reservations." 80 Cong. Rec. 8701 (1936) (Mr. Whittington). *See also id.* (Senate).
>
> The Interior Solicitor has concluded that the statute does not authorize state taxation of fuel purchased by a tribal enterprise to operate a tribal sawmill but does authorize state taxation of retail sales by the tribal enterprise, both to Indians and to other persons. 57 Interior Dec. 129 (1940).

Cohen's, p. 412, footnote 62. This hardly qualified as a considered action relating to the effect it would have upon Indian Country.

Elsewhere within the same bill, appropriations are made for Indian roads. Section Three specifies that:

> [T]here is hereby authorized to be appropriated for the survey, construction, reconstruction, and maintenance of main roads through unappropriated or unreserved public lands, *nontaxable Indian lands*, or other Federal reservations other than the forest reservations. (Emphasis added).

Act of June 16, 1936, §3. Section Six also specifically refers to "Indian reservation roads" and appropriates $4,000,000.00 for such roads. Thus, within the same act referred to by Petitioners it is illustrated that the Congress knew how to make separate provisions apply to Indian Country. If the term Federal reservation encompassed Indian reservations, there would have been no need to repeat a term which was a subset thereof. This makes particular sense as Indian reservations are not in reality set aside for the use and benefit of the federal government. Indian reservations were created, or reserved for the use and occupancy of Indian Tribes, who were and are at least a semi-sovereign separate and apart from the federal government.

Other contemporary Acts further illustrate the non-taxability of Indian lands within Oklahoma. Ten days after the passage of the Hayden-Cartwright Act the Congress passed the Oklahoma Indian Welfare Act, Act of June 26, 1936. This Act was to promote the general welfare of the Oklahoma Indian, and bestow upon them the benefits of the Indian Reorganization Act, Act of June 18, 1934. In so doing, Section One allowed the acquisition of lands for Oklahoma Indians and provided that "Title to all lands so acquired shall be taken in the name of the United States, in trust . . . , and while title thereto is held by the United States said lands shall be free from any and all taxes, save that the State of Oklahoma is authorized to levy and collect a gross-production tax." Thus by specific legislative intent, gross production taxes, *and no other,* were made applicable to newly acquired Indian trust land.

(b) Up to this point, Petitioner has consistently argued that there are no reservations remaining in Oklahoma. *See Sac and Fox Nation, supra.* If the Court should decide that the 4 U.S.C. §104 applies to Indian Tribes, then in order for this Court to apply the Act to the Chickasaw and other Oklahoma Tribes, this Court must find that reservations continue to exist in Oklahoma.

The effect of the early statutes defining Indian country was summarized by the noted Indian law scholar, Felix Cohen, in his *Handbook of Federal Indian Law* 6 (1942 ed.) as follows:

> Indian country in all these statutes is territory, wherever situated, within which tribal law is generally applicable, federal law is applicable only in special cases designated by statute, and state law is not applicable at all.[4]

Although the 1834 definition of Indian Country was not included in the Revised Statutes of the United States, and therefore repealed, it provided a useful mechanism for the Court to apply statutory laws relating to "Indian Country" and "Indian Reservations". *Donnelly v. United States*, 228 U.S. 243, 269 (1913). In a series of now famous cases, the Court developed a definition of "Indian Country" at common law which included Indian reservations, *Bates v. Clark*, 95 U.S. 204 (1887); *Donnelly, supra*, trust and restricted Indian allotments, *United States v. Pelican*, 232 U.S. 442 (1914); *United States v. Ramsey*, 271 U.S. 467 (1926), and areas set aside for the use and occupancy of Indians (dependant Indian communities) although not called a "reservation", *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. McGowan*, 302 U.S. 535 (1938).

The Hayden-Cartwright Act speaks of the application of state taxes to federal reservations. However, reservations are just one manner in which Indian lands arise to the status of

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[4] The complete prohibition as to the application of state law in the Indian Country has been modified to the extent Congress has deemed proper. 18 U.S.C. §1161 (liquor laws); Act of February 15, 1929, Ch. 216, 45 Stat. 1185 (health and education) (25 U.S.C. §231); 25 U.S.C. §§232, 233 (New York); *see also*, Public Law 83-280.

Indian Country. The statutory definition of Indian Country, contained in 18 U.S.C. §1151 lists three categories of Indian lands; reservations, allotments and, dependent Indian communities. Indian Country is the term of art that refers to land validly set apart for the use of Indians because of their status as Indians. *Sac and Fox Nation,* 113 S.Ct., at 1991. The general rules of tribal sovereignty and preemption or infringement articulated by this Court apply generally to all categories of Indian Country. *Sac and Fox Nation, supra.* However, if this Court is to apply 4 U.S.C. §104 to Indians, and Congress uses different terms within the Act, as it did in section three of the Hayden Cartwright Act, it must be assumed that different meanings were ascribed to those terms. Thus, the term in Section three, "nontaxable Indian lands" which would clearly include not only reservations, but also allotments and dependent Indian communities, must mean something different than "United States military or other reservations."

II. THE STATE OF OKLAHOMA HAS, AB INITIO, BEEN PRE-EMPTED FROM TAXING INDIAN COUNTRY INCOME WITHIN THE CHICKASAW NATION.

A. CONGRESS PRECLUDED STATE AUTHORITY IN THE INDIAN COUNTRY FROM THE BEGINNING.

> It rests with Congress to determine when the guardianship relation shall cease. Thus far Congress has not terminated that relation with respect to the Creek Nation and its members. That Nation still exists, and has recently been authorized to resume some of its former powers. *Board of County Comm'rs. of Creek Country v. Seber,* 318 U.S. 705, 718 (1943). (citations omitted).
>
> In our opinion, the purpose expressed in [section 1 of the Oklahoma Enabling Act, 34 Stat. 167] to reserve to the government of the United States the authority to make laws and regulations in the future

> respecting the Indians is, under the circumstances, evidence tending to negative a purpose to repeal by implication the existing laws and regulation of the subject.
>
> . . .
>
> The Reservation of the authority of Congress to legislate in the future respecting the Indians residing within the new state is clearly supportable under the Federal Constitution, art. 1, Section 8, which confers upon Congress the power "to regulate commerce . . . with the Indian tribes." It has been repeatedly held by this court that under this clause traffic or intercourse with an Indian tribe or with a member of such a tribe is subject to the regulation of Congress, although it be within the limits of a state. *Ex Parte Webb*, 225 U.S. 663, 683 (1912).

Prior to 1890, all government in Oklahoma was tribal government, and the tribes residing in Oklahoma enjoyed the full cornucopia of powers possessed by Indian tribes generally. The beginning of non-tribal government in Oklahoma came in 1890 with the advent of the Territory of Oklahoma. The Oklahoma Organic Act of May 2, 1890, ch. 182, 26 Stat. 81 (1890), contained a proviso of significance to the present case. Section 1, in pertinent part, states:

> Provided, that nothing in this act shall be construed to impair any right now pertaining to any Indians or Indian tribe in said Territory under the laws, agreements and treaties of the United States, or to impair the rights of person or property pertaining to said Indians, or to affect the authority of the government of the United States to make any regulation or to make any law respecting said Indians, their lands, property or other rights which it would have been competent to make or enact if this Act had not been passed.

It is clear that the tribal governments that predated and preceded the creation of the Territory of Oklahoma were vested with exclusive civil jurisdiction over their territory

including exclusive authority to levy and collect taxes. By enacting this proviso, the quoted Section 1 of the Organic Act, Congress clearly intended to preserve exclusive federal and tribal jurisdiction undiminished by the creation of the new Territory, and later the new State.

The Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 267, in Section 1 continued these federal and tribal protections through the creation of the state. Section 1 provides:

> That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the state of Oklahoma, as hereinafter provided: Provided, that nothing contained in the said constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said territories (so long as such right shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property or other rights by treaties, agreement, law or otherwise, which it would have been competent to make if this Act had never been passed.

Congress expressly reserved, in Section 1 of the Oklahoma Organic Act, and again in Section 1 of the Oklahoma Enabling Act, its complete and exclusive authority over the persons, property and other rights of Indians "by treaties, agreement, law or otherwise." Pursuant to these acts, Article 10, Section 6 of the Oklahoma Constitution exempts from state taxation:

> such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by federal laws, during the force and effect of such treaties or federal laws

and Article 1, Section 3 thereof states in pertinent part:

> The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to . . . all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

The intent of the Oklahoma Organic Act with respect to the Indian tribes, and therefore that of the Oklahoma Enabling Act which contains substantially the same language, is illustrated by an exchange between Congressmen Mansur and Turner during the floor debates. The purpose of the Oklahoma government vis-a-vis the Indian tribes and their territory was explained as follows:

> Mr. Mansur: Is the gentleman aware that the laws of the United States in full force today make it a criminal offense to take intoxicating liquor into the reservation of any Indians?
>
> Mr. Turner: But I suggest to the gentleman that this is no longer a reservation, but a Territory.
>
> Mr. Mansur: But I desire to remind the gentleman that, as this bill expressly declares, *this Territorial government or organization is not for any Indian reservation whatever; it does not apply to Indian reservations.*

51 Cong. Rec. 2104 (1890) (remarks of Messrs. Mansur and Turner) (emphasis added). Perhaps in part because the allotment agreements were then being negotiated, Congressman Mansur emphasized that the Indian tribes and their reservations were to be unaffected by the creation of Oklahoma:

> I challenge any gentleman on this floor – I care not who he is – to take any one of the first twenty-four sections of this bill [the Sections relating to Oklahoma Territory] and show where it touches a red man at all. I repeat, for I would like to have it understood, that the first twenty-four sections of

> this bill do not relate to a red man or to a tribe, do not relate to the Indians in any manner whatever. The first twenty-four sections relate to white men only, of whom there are 200,000 in that Territory now asking for law and order and legislation . . .
>
> Now, as to every Indian reservation within the whole limits of the Indian territory as now organized, we say expressly that those first twenty-four sections of the act thus organizing this Territorial government shall not apply. Remember, gentlemen, we say in plain, clear language that as to every Indian tribe and as to the land of every Indian tribe, none of these twenty-four sections which apply to the white people shall operate.

Id. at 2176. Notwithstanding the claims of the Oklahoma Tax Commission, it appears that the proponents of the bill to create Oklahoma did not think they had to destroy tribal government or Indian treaty rights in order to accomplish their purpose.

These provisions constitute specific federal statutes speaking directly to limitations of the jurisdiction of the State of Oklahoma in Indian matters. Moreover, this bar to state authority coincides with the creation of the jurisdictional competitor. From a reading of this statute, it can be said the Territory and State have *ab initio* been preempted in this area.

The outgrowth of this summary review, is that clearly the *per se* rule of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) and *Montana v. Blackfeet Tribe*, 471 U.S. 759, 765 (1985) prohibiting State taxation of Indians in Indian Country, remains applicable to Indian tribes in Oklahoma in general, and the Chickasaw Nation in particular. The corollary to this rule is that the failure of the Oklahoma Tax Commission to plead and prove specific unambiguous congressional authority both to levy, and collect, the particular taxes at issue is fatal to its cause. Simply stated, state authority to tax an Indian tribe or individual Indians within Indian

Country are completely preempted by federal law in the absence of Congressional action to the contrary.[5]

B. THE CHICKASAW TREATIES PRECLUDE STATE TAXATION WITHIN THE NATION'S INDIAN COUNTRY.

Article IV of the Treaty of Dancing Rabbit Creek, Sept. 27, 1830, 7 Stat. 333, explicitly grants the Chickasaw Nation exclusive jurisdiction over itself and its descendants thus leaving no room for state taxation of the income within the jurisdictional Indian Country of the Chickasaw Nation. Article IV of the treaty states in pertinent part:

> no Territory or State shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants . . .

This is consistent with this Court's ruling in *McClanahan, supra* at 170-171:

> State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply. It follows that Indians and Indian property on an Indian reservation are not subject to State taxation except by virtue of express authority conferred upon the State by an act of Congress.

The rules discussed above regarding statutory interpretation apply even more vigorously when, as here, the state asserts that Treaty rights have been abridged. *Dion,* very explicitly held:

> in the absence of explicit statement, " 'the intention to abrogate or modify a treaty is not to be lightly

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[5] Amicus Sac and Fox Nation would also point the Court to Part III of the nation's brief, *post.*

> imputed to the Congress.' " *Id.*, at 413, Quoting *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160 (1934). Indian treaty rights are too fundamental to be easily cast aside.

Dion, 476 U.S., at 739, citing *Menominee Tribe v. United States*, 391 U.S. 404 (1968). Combined with the fact that treaties are to be liberally construed in favor of the Indians, *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Choate v. Trapp*, 224 U.S. 665, 675 (1912) and that treaties should be construed as the Indians themselves would have understood them, *Choctaw Nation v. United States*, *supra*, militates strongly in favor of the position of the Chickasaw. It bears remembering that during the very years that the Treaty of Dancing Rabbit Creek was being negotiated the Cherokees were litigating the exact issue of attempts by the state of Georgia to enforce its state laws upon the Cherokee Nation, which along with the Chickasaws compose one of the Five Civilized Tribes. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). When the proper standard of treaty abrogation and interpretation of this Court is read in conjunction with the discourse on the floor of Congress during the debates regarding the Oklahoma Organic Act is should be clear that Article IV of the Chickasaw Treaty continues in full force to this day.

The income at issue in this case is earned within Chickasaw Indian Country through employment by the tribal government, where both the federal and tribal government's interest in establishing strong tribal governments is at its zenith and are *per se* preempted as an infringement on tribal self-government.

The Petitioner also argues that its tax should be allowed because it provides services to members off of Tribal land. The Petitioner continues to ignore that fact that the Chickasaw Nation provides governmental services to its members and other residents of its jurisdiction while the State does not. The State Courts and Federal Courts sitting in Oklahoma are certainly aware of the situation. *United States v. Littlechief*, No. 76-207-D (W.D. Okla., Nov. 7, 1977) followed and reprinted in *State v. Littlechief*, 573 P.2d 263 (Okla. Crim.

1978) (murder case); *C.M.G. v. State*, 594 P.2d 798 (Okla. Crim. 1979) *cert. den.* 444 U.S. 992 (1979) (murder case); *Cheyenne-Arapaho Tribes v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980) (hunting and fishing); *Ross v. Neff*, 905 F.2d 1349, 1352 (10th Cir. 1990) (country sheriff without authority to arrest Indian within Indian Country); *Housing Authority of the Seminole Nation v. Harjo*, 790 P.2d 1098 (Okla. 1990) (eviction); *Ahboah v. Housing Authority of the Kiowa Tribe*, 660 P.2d 625 (Okla. 1983).

Employment within Indian Country directly involves the Tribe through its inherent regulatory power over the work place, its form of government, and the federal policy of encouraging economic development within Indian Country. *See e.g.*, Indian Self-Determination Act, 25 U.S.C. Section 450a *et seq.* and Indian Finance Act, 25 U.S.C. Section 1451 *et seq.* Members and non-members enjoy the protection of the laws, courts, police, and other Tribal services while within the Indian jurisdiction. There is nothing in the opinion below which suggests that the State of Oklahoma offers governmental services for those individuals, members or not, within the Chickasaw jurisdiction. The State of Oklahoma has no legal duty to provide services to the Chickasaw Nation's jurisdiction, and in some instances could be liable for attempting to provide services. *See Ross v. Neff, supra.*

Perhaps the Tax Commission believes the transactions being taxed occurs off Indian Country. However, it should be very clear that the transactions attempting to be taxed by the state arise on Tribal lands. When a person is employed, and work is done within Chickasaw lands and those actions are taxed by the state, then Tribal self-government is infringed by the state. The State taxes concerning income tax are directed at building roads. The taxes involved herein are used by Chickasaw for various governmental functions.

III. COURT SHOULD RECONSIDER ITS RECENTLY DEVELOPED INDIAN DOCTRINE IN LIGHT OF RECENT CONGRESSIONAL ACTION REJECTING THE COURT'S RECENT SHIFT IN POLICY

In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), the court embarked on two new, and untested policies to be applied in the field of federal Indian law. First, the Court created from the whole cloth the idea that tribal powers of self-government could be limited by judicial decree in instances where Congress had taken no action to limit such powers if the Court believed that the exercise of a challenged tribal governmental power was "inconsistent with the Tribe's status." Secondly, the Court determined that the exercise of criminal jurisdiction over non-Indians by Indian tribal courts was "inconsistent with the status" of the Suquamish Indian Tribe. The natural outgrowth of this case included cases such as *United States v. Wheeler*, 435 U.S. 313 (1978) decided just after *Oliphant*, in which the Court carefully limited its language in a case resulting in the recognition of inherent tribal authority over the punishment of criminal offenses to tribal members.

On the civil side, the Court also began to implement its new concept of distinction between tribal members and all other persons by beginning to authorize state taxing and regulatory authority over non-Indians and members of Tribes not a part of the particular reservation at issue. Thus, in *Colville*, 447 U.S., at 161 (1980), and its progeny, the Court announced that the State could tax the sales of cigarettes to "non-members" – even if the non-member was an Indian.[6]

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[6] The "cigarette cases" could have been explained through a proper analysis of Public-Law 83-280 had the Court chosen to do so, and the same result would have been reached in each case prior to *Oklahoma Tax Commission v. Citizen Band Potawatomi*, 111 S.Ct. 905 (1991). In *Potawatomi*, the Court directly announced for the first time that States had the authority to tax non-tribal member Indians without compliance with the Congressionally mandated prescription for the extension of state law into

Although inconsistent with almost five hundred years of historical relations between Indians and non-Indians, and two hundred years of relations between the United States and the Indian Tribes, these new activistic judicial doctrine logically could result only in a ruling that Tribe's had also lost criminal jurisdiction over Indians who were members of other tribes, as well as civil jurisdiction over non-Indians and Indians who were members of other tribes unless the Court could infer some reasonable semblance of consent for the exercise of tribal jurisdiction over such non-tribal members. *See e.g., Montana v. United States*, 450 U.S. 544 (1981). Finally, in *Duro v. Reina*, 495 U.S. 676 (1990), the Court reached the logical conclusion of this new line of reasoning by holding the Tribes' had, by implication only, lost their criminal jurisdiction over non-member Indians because the Court – without benefit of an Act of Congress – determined that the exercise of such government authority was "inconsistent with their status."

The response from Congress was immediate and direct.[7] For the first time since *In Re Heff*, 197 U.S. 488 (1905), ninety years ago, Congress passed legislation specifically designed to reverse the Indian law doctrine advanced by the Court.[8] In a military appropriation bill, P.L. 101-511 (1990),

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the Indian Country, and the adjudication of disputes arising in the Indian Country involving Indians or their property in the state courts.

[7] At least five States petitioned Congress to reverse the *Duro* decision, and the legislative history indicates strong support from others. *See*, for example, 140 Cong. Rec. S.2635, S.2637, POM-399. While certain state tax commissions will attempt to exercise jurisdiction when they believe the Court will allow them to collect revenues from the Indian Country the legislative arms of the "Indian" States do not want to spend the revenues needed to provide law enforcement and other services to the Indian Country.

[8] After the Congressional "fix" of *In Re Heff*, the Court acknowledged the Congressional action, overruled *Heff*, and followed the doctrinal notions behind the statute adopted by Congress in that instance. *United States v. Nice*, 241 U.S. 591 (1916).

Congress first passed a "temporary" statute designed to overturn the *Duro* decision, and in P.L. 102-137, 105 Stat. 646, 102 Cong. 1st sess., the fix was made permanent. In this legislation, and its accompanying legislative history[9] make it abundantly clear that the Congress does *not* subscribe to these new doctrines lately advanced by the Court, and specifically rejected the attempt to distinguish between members of the local tribe, and other Indians who are living, working, or simply come within that tribe's Indian Country. Simply stated, the *Duro* decision invited the Congress to review these new Supreme Court Indian law doctrines, Congress did so, and rejected them in no uncertain terms.

In addition to the Congressional rejection of the Court's doctrines drawing distinctions between "non-member" and "member" Indians and the idea of implied diminishment of inherent Indian sovereignty, the Congress has consistently acted of late in support of tribal sovereign authority. *See, e.g.*, P.L. 103-176, the Indian Tribal Justice Act (1993), and its accompanying history.[10] In this Act Congress explicitly finds that the trust responsibility of the entire United States government "includes the protection of the sovereignty of each tribal government" (Section 2(2)); that Congress has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes through statutes, treaties, and the exercise of administrative authorities (Section 2(3)); and that Indian tribal justice systems are important for the preservation of the public health and safety, the political and cultural integrity of tribal government, and the adjudication of disputes affecting important personal and property rights. (Section 2(5)(6)(7)). Likewise, several members of Congress have publicly

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[9] H. Conf. Rpt. 101-938; HR No. 102-61, May 14,1991; SR No. 102-153, Sept. 19, 1991; H. Conf. Rpt. 102-261, Oct. 22, 1991; and related reports; SR No. 102-168, Oct. 2, 1991.

[10] House Report No. 103-205, August 2, 1993; Senate Report No. 103-88, July 15, 1993; House Conference Report No. 103-383 (Nov. 19, 1993).

announced their concern that an understanding of traditional Indian law doctrines beginning with *Worcester v. Georgia*, 31 U.S. 515 (1832) should be a prerequisite for appointment to the federal bench. Congressional Record – Senate, Monday, August 2, 1993, 103rd Cong. 1st Sess. 139 Cong. Rec. S. 10083, The Supreme Court of the United States. (Confirmation hearing of Justice Ginsberg.)[11]

If one reviews the legislation of Congress since 1970, research does not reveal statutes passed to limit the exercise of tribal authority, or to distinguish tribal authority between members and non-members, not to authorize the application of state law to either Indians or non-Indians in the Indian Country, nor to limit tribal authority with regard to fee lands within the Indian Country. See, 18 U.S.C. §1151(a) "notwithstanding the issuance of any patent", and *Seymore v. Superintendent*, 368 U.S. 351 (1962). Yet these things the Court has created without direction from the Congress within this same period. In short, Congress has now rejected these notions. The statutes of Congress passed with regard to Indian affairs since 1970 are replete with approving references to the doctrines of inherent Tribal sovereignty, lack of state authority, and the constitutionally created Congressional monopoly in the regulation of relations between citizens of the United States, and Indian person within the Indian Country in their legal and political status as Indians, U.S. Const. Art. 1, Sec. 8, Cl 3. If one accepts the Congressional philosophy, expressed in these statutes and legislative reports, it is apparent that state action with respect to all commerce affecting persons and property in the Indian Country in which Indians are interested in their governmental or proprietary capacity is preempted by the Congressional control of such commerce, or the Congressionally acknowledged inherent rights of the Tribe to govern both

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[11] I also want to put future Supreme Court nominees on notice that I will insist they have an interest and understanding Indian Country law. After today, I will not vote for a nominee unless I am satisfied that they have demonstrated this concern (Remarks of Mr. Pressler).

their members and their Indian Country territory, in the absence of an explicit statement of Congress authorizing the application of state law. The Court should reassess its Indian law doctrines in light of the first Congressional action directly intended to reverse Court Indian law doctrine in almost one hundred years, and announce its return to the logical clarity of the intent of the original framers of the Constitution as expressed in the *Worcester* decision, as expected by Congress.

CONCLUSION

If the Court is to remain faithful to the intent of the framers of the constitution, it must uphold the authority of Congress alone to allow taxation of transactions involving Indians in the Indian Country and affirm the United States Court of Appeals for the Tenth Circuit.

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Supreme Court of the United States

October Term, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit

BRIEF AMICI CURIAE OF THE CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA, THE NATIONAL CONGRESS OF AMERICAN INDIANS, et al., IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are nine federally-recognized Indian tribes and one national Indian organization. Amici have a substantial interest in the issues raised in this case. The issues involve the right of Indian tribes and their members to be free from state taxing jurisdiction over sales of motor fuel and tribal members' income.

Some amici currently sell fuel to members and non-members in Indian country while others are planning fuel operations for the future. Also, some amici employ tribal members within Indian country while those members live outside of Indian country. All amici exercise their sovereign authority over their Indian lands, including commercial activities occurring on those lands.

Amici vehemently oppose the State's attempt to exercise jurisdiction over tribal fuel sales within Indian country and its taxation of tribal members working for the Tribe within Indian country. Such exercise of State taxing jurisdiction significantly threatens the inherent rights of all Indian tribes to be self-governing and free from State jurisdiction within Indian country.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent, the Chickasaw Nation ("the Tribe"), currently owns and operates convenience stores on tribal trust land from which they sell motor fuel. The Petitioner, Oklahoma Tax Commission ("the State"), seeks to tax those sales. The State also seeks to tax the income of tribal members who work for the Tribe on tribal trust land but live outside of Indian country. The Court of Appeals struck down both taxes and its holding should be affirmed.

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[1] Counsel for Petitioner and Counsel for respondent both consent to the filing of the Brief of *Amici*. Their letters are submitted for filing herewith.

In its brief on the merits, the State argues that the Hayden-Cartwright Act, 4 U.S.C. § 104 "expressly authorizes state taxation of motor fuel sales on federal reservations, including Indian reservations." Pet. Br. at 14. This argument was not presented to either court below, nor was it passed on by them. This argument is not properly before the Court and should not be considered. Rather, the Court should dismiss certiorari as improvidently granted as to the motor fuels tax issue. Alternatively, the Court should decide the issue without reference to the Act.

Should the Court nevertheless reach the Act, it should find that the Act does not indicate an unmistakably clear Congressional intent to abrogate Indian tax immunity; moreover, the relevant legislative history and the canons of construction lead to the conclusion that there is no State authority to tax under the Act.

Absent clear Congressional authorization in the Hayden-Cartwright Act to impose the motor fuel taxes, principles of federal preemption preclude the states from imposing such taxes where the legal incidence falls on either the tribe or the Indian consumer. There is in fact, a *per se* rule against the imposition of such taxes. In addition, the imposition of such taxes would infringe on the right to tribal self-government.

Assuming *arguendo* that the Act does apply to Indian reservations, its only effect is to codify existing law that on-reservation sales by non-Indian traders to non-Indians are taxable.

The same principles of federal preemption and tribal sovereignty preclude the imposition of a state income tax on the income of enrolled tribal members who earn their income working for the Tribe in carrying out its sovereign functions within Indian country even though these members reside outside of Indian country.

ARGUMENT

I. BECAUSE THE HAYDEN-CARTWRIGHT ACT WAS NOT RAISED OR PASSED ON BELOW THE COURT SHOULD DISMISS CERTIORARI AS IMPROVIDENTLY GRANTED ON THE MOTOR FUEL TAX ISSUE; ALTERNATIVELY, THE COURT SHOULD DECLINE TO CONSIDER THE ACT IN REACHING ITS DECISION

In its brief on the merits, the State argues that the Hayden-Cartwright Act, 4 U.S.C § 104, ("the Act") "expressly authorizes state taxation of motor fuel sales on federal reservations, including Indian reservations." Pet. Br. at 14. The State did not argue or brief the Act to the District Court or to the Court of Appeals. And, neither lower court ruled on the Act.[2] Nor did the State raise the Act in its petition for certiorari.

This Court will ordinarily not consider an issue not raised or passed on below. *Duignan v. United States*, 274 U.S. 195 (1927); *Springfield v. Kibbe*, 480 U.S. 257, 258-59 (1987). Only the most "extraordinary," "unusual," or "exceptional" circumstances will warrant review where a party has failed to raise an issue below. *Taylor v. Freeland and Kronz*, 503 U.S. 638, 112 S.Ct. 1644 (1992); *Equal Employment Comm'n v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986); *Yee v. Escondido*, 503 U.S. 519, 112 S.Ct. 1522 (1992).

Here the State presents no "extraordinary", "unusual" or "exceptional" circumstances that would explain its failure to preserve the Hayden-Cartwright Act issue. The only explanation the State gives for not raising the Act is that during the entire course of this litigation it

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[2] The Court of Appeals stated *sua sponte* that "the issue was not raised" and that it would "express no opinion on it." Chickasaw Nation v. State of Oklahoma ex rel. Oklahoma Tax Comm'n, 31 F.3d 964, 972 n.4 (10th Cir. 1994) (No. 92-7117).

was of the view that "the relevant boundary for taxing jurisdiction [was] the perimeter of a formal reservation, not merely land set aside for a tribe or its members." Pet. Br. at 24. The State maintains that this Court's decision in *Oklahoma Tax Commission v. Sac and Fox Nation*, 113 S.Ct. 1985 (1993) first put it on notice that the Act might be applicable to the lands involved in this case. This argument is unconvincing for several reasons.

First, in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi*, 498 U.S. 505, 511 (1991), this Court had already explicitly told the State that the relevant boundary for jurisdictional purposes was any land "validly set apart for the use of the Indians. . . . " *Potawatomi* was decided in February 1991, one year before the State filed its brief in support of summary judgment in the District Court in the present case.

Second, in its brief to the Court of Appeals, the State treated Indian country as if it were the equivalent of formal reservation lands. *See* Appellee's Answer Brief at pp. 10-15, *Chickasaw Nation v. State of Oklahoma, ex rel Oklahoma Tax Commission*, 31 F.3d 964 (10th Cir. 1994) (No. 92-7117). That is directly contrary to its assertion now. Pet. Br. at 24 n.11.

Finally, *Oklahoma Tax Comm'n v. Sac and Fox Nation*, itself, was decided well before the petition for certiorari was filed. Thus the State has no good reason for waiting until its brief on the merits to first raise the Hayden-Cartwright Act.

Because the State failed to raise and preserve the Hayden-Cartwright Act issue, this Court should dismiss certiorari as improvidently granted. Dismissal is particularly warranted where, as here, a "central issu[e] on which resolution of the question presented may well turn cannot be reached or resolved" because of a petitioner's failure to raise it below, and lack of a sufficient excuse for not doing so. *Equal Employment Opportunity Comm'n v. Fed. Labor Relations Auth.*, 476 U.S. 19 (1986). Dismissal is

appropriate in such a situation because, by raising an issue for the first time after certiorari has been granted, the petitioner alters the situation as originally apprehended by the Court when it granted certiorari. *See* Sheldon R. Shapiro, *When Will Supreme Court Dismiss Writ of Certiorari as Improvidently Granted*, 30 L.Ed.2d 829. Because the Court was not informed of the Hayden-Cartwright Act argument before it granted certiorari, it should dismiss certiorari as improvidently granted on the motor fuel tax issue.

Alternatively, if the Court decides to reach the merits of the State's motor fuel taxing jurisdiction it should do so without considering the applicability of the Hayden-Cartwright Act.[3]

However, should this Court decide to reach the issue of the Hayden-Cartwright Act's applicability, it should find that the Act does not grant the State jurisdiction to tax in this instance.

II. THE HAYDEN-CARTWRIGHT ACT DOES NOT GRANT STATES JURISDICTION TO TAX MOTOR FUEL SALES ON INDIAN RESERVATIONS; AT LEAST IT DOES NOT ABROGATE INDIAN IMMUNITY FROM STATE TAXATION ON SUCH RESERVATIONS

The Hayden-Cartwright Act was first enacted in 1936 as section 10 of an Act to amend the Federal Highway Act. (Act of June 16, 1936, ch. 582, § 10, 49 Stat. 1519,

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[3] *See, e.g.*, Taylor v. Freeland & Kronz, 503 U.S. 638, 112 S.Ct. 1644 (1992) (refusing to consider a different section of a code under review where raised for the first time in an opening brief on the merits); Air Courier Conf. v. Postal Workers, 498 U.S. 517 (1991) (declining to consider a statute's applicability where party failed to raise it before its brief in opposition to the petition for certiorari).

1522). While only a part of the original Hayden-Cartwright Act, section 10 itself is now popularly referred to as the Hayden-Cartwright Act. Section 10 was itself amended in 1940 by a section of the Buck Act (an Act permitting states to extend their sales, use, and income taxes to federal areas) (Act of Oct. 9, 1940, ch. 787, 54 Stat. 1059 (codified at 4 U.S.C. §§ 105-110). Finally, in 1947 it was codified, as amended at 4 U.S.C. § 104, where it is found today. The relevant portions of the Hayden-Cartwright Act provide:

> (a) All taxes levied by any State . . . upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels when sold by or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders, and other similar agencies, located on United States military or other reservations, when such fuels are not for the exclusive use of the United States.
>
> (b) The officer in charge of such reservation shall . . . submit a written statement to the proper taxing authorities of the State . . . within whose boundaries the reservation is located, showing the amount of such motor fuel with respect to which taxes are payable . . .

4 U.S.C § 104 (1952).

A. The Hayden-Cartwright Act Does Not Apply To Indian Reservations

1. On its face, the Hayden-Cartwright Act does not manifest unmistakably clear congressional intent to authorize state jurisdiction to tax tribal motor fuel sales on Indian reservations

Congress may authorize states to impose taxes on Indian tribes and individual Indians, however:

> [i]t has not done so often, and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so *unmistakably clear*.

Montana v. Blackfeet Tribe, 471 U.S. 759, 765 (1985) (emphasis added); *See also Bryan v. Itasca County*, 426 U.S. 373 (1976).

Although the Hayden-Cartwright Act explicitly singles out "military reservations" – unmistakably evidencing Congress' intent to include those reservations in the terms of the Act – it does not specifically mention Indian reservations. Nor does it anywhere mention Indians or Indian tribes. The language thus falls far short of the unmistakably clear requirement. Hence, this Court should hold that the Act does not authorize state taxation of motor fuel sales on Indian reservations.

2. Assuming *arguendo* that the lack of unmistakably clear congressional authorization on the face of the Act is not dispositive, principles of statutory construction require a finding that the Act does not apply to Indian reservations

Special principles of construction govern the determination of the Act's applicability here because Indian rights are implicated. *Montana v. Blackfeet*, 471 U.S. 759, 766 (1985). In deference to Congress' trust responsibility toward Indians, this Court has developed canons of construction that favor preservation of Indian rights. These canons apply forcefully where ambiguous statutes are claimed to allow state taxing jurisdiction over Indian activities within Indian country. In such a situation, "doubtful expressions are to be resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (quoting *Alaska Pacific Fisheries v. United States*, 248 U.S.

78, 89 (1918)). Hence, statutes are to be construed narrowly when Indian rights are to be abrogated or limited. *See generally* Felix S. Cohen, *Handbook of Federal Indian Law* 221-25 (1982 ed.). Amici will show that neither the language nor the legislative history of the Hayden-Cartwright Act manifests the requisite clarity of expression required by the canons that would support a finding that the State has taxing jurisdiction over Indians in this case.

a. The language in the Act strongly suggests that Indian reservations were not meant to be included in the scope of the Act

The scope of the Hayden-Cartwright Act's coverage is governed by the phrase "United States military or other reservations." This phrase is evocative of general governmental reservations having general governmental purposes carried out by governmental employees. However, it is ambiguous with regard to whether Indian reservations, which are created for the benefit of Indian people, not the government, and which are occupied by Indian people with the United States simply acting as a trustee, are included.

Other phrases in the Act also raise doubt that Indian reservations were included in the scope of the Act. For example, the grant of taxing jurisdiction under the Act only applies "when such fuels are not for the exclusive use of the United States." In other words, where the fuel is being used by the United States for official governmental purposes, the fuel is exempt from the tax. Had there been an intent to include Indian reservations, the same exemption would undoubtedly have been retained for use of fuel by Indian tribes in the conduct of their business. It is unthinkable that the United States would not have reserved to the impoverished tribes under its trust at least the same treatment as it did for itself.

Additionally, in section (b), the Act requires that certain tax reports be filed by "the officer in charge of such reservation . . . " a phrase which, once again fits general governmental reservations, but not an Indian reservation. Tribal officials are in charge of Indian reservations and they would be in no position to make such reports.

The only term which is at all suggestive of Indian reservations is the term "licensed traders." This term appears in a laundry list of establishments which might appear on a reservation. An Opinion of the Solicitor of the Department of the Interior, found that the reference to licensed traders gave only "slight" indication that Indian reservations were included within the Act.[4] Applying the canons of construction, the Act must be interpreted so as not to include Indian reservations.

b. The legislative history of the Hayden-Cartwright Act supports the conclusion that the Act was not meant to apply to Indian reservations

In *Bryan v. Itasca County, supra,* the issue was whether a statute which gave states civil jurisdiction over reservation

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[4] Amazingly, contrary to the canons of construction, the opinion then concluded that the Act applied – notwithstanding the fact that in 1912, this Court in Choate v. Trapp, acknowledged that special Indian "rule[s] of construction [have] been recognized, without exception for more than a hundred years, and [have] been applied in tax cases." 224 U.S. 665, 675 (1912). *See* The Kansas Indians, 72 U.S. (5 Wall) 737 (1867). Application of Federal and State Sales Taxes to Activities of Menominee Indian Mills, 57 Interior Dec. 129, 139 (1940). *See also* Opinion of the Attorney General, 38 Op. Atty. Gen. 522 (1936). Both opinions construed the statute *liberally* in favor of abrogating Indian rights. Because these opinions disregarded established canons of construction, their conclusions are facially invalid and should be disregarded. *See* Pittson Coal Group v. Sebben, 488 U.S. 105 (1988).

Indians, also gave states the authority to tax Indians. First, the Court reviewed the legislative history of the statute and found

> . . . the total absence of mention or discussion regarding a congressional intent to confer upon the States an authority to tax Indians or Indian property on reservations. . . . This omission has significance in the application of the canons of construction applicable to statutes affecting Indian immunities, as some mention would normally be expected if such a sweeping change in the status of tribal government and reservation Indians had been contemplated by Congress.

426 U.S. at 381 (1976) (footnotes omitted).

The Court then referred to other laws in which Congress had expressly authorized states to tax Indians, which the Court cited as "cogent proof" that if Congress intended to empower states to tax Indians, it " . . . knew well how to express its intent directly. . . . " *Id.* at 389. The Supreme Court's analysis in *Bryan* is directly relevant to the Hayden-Cartwright issue.

As with the act involved in *Bryan*, there is no reference to Indians or Indian reservations in the legislative history of the Hayden-Cartwright Act.[5] The language

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[5] Both the Attorney General's Opinion, 38 Op. Atty. Gen. 522 (1936) and the Interior Department Solicitor's Opinion, 57 Interior. Dec. 129 (1940), suggest that because other sections of the 1936 Act mention specific types of reservations – including Indian reservations – that Congress had in mind Indian reservations when it drafted section 10 (the provision now referred to as the Hayden-Cartwright Act). This inference is flawed, however. Section 10 was not part of the original Hayden-Cartwright bill (which dealt with road construction). The section 10 provision was an after-added provision. *See* Felix S. Cohen, Handbook of Federal Indian Law, 412 n. 62 for full discussion on the history of the Act's introduction. Thus, any intent demonstrated

only states that: " . . . there is complaint in many parts of the country about the inability of the States to collect revenue on gasoline sold on *Government* reservations not for governmental use." 80 Cong. Rec. 6913 (1936) (emphasis added). While members of Congress felt States should not be allowed to collect taxes where motor fuel was purchased on government reservations for the exclusive use of the United States, they felt that the privilege of tax exemption, "should not be extended to officials or employees when not in actual discharge of their official duties." *Id.*

This record verifies that the Act was meant to apply to general governmental reservations having general governmental purposes carried out by governmental employees and not Indian reservations which are distinguishable. Tribal members residing on their reservation are not officials or employees. Indian reservations were not created for the benefit of the federal government, but for the benefit of Indian people. Indian reservations are not owned outright by the United States, but are held in trust for Indian tribes. Furthermore, there is no evidence in the legislative history that Congress actually considered the conflict between the Hayden-Cartwright Act and Indian rights to be free from state taxation and "chose to resolve that conflict by abrogating [those rights]." *United States v. Dion*, 476 U.S. 734, 740 (1986).[6] The legislative

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by Congress in other sections of the 1936 Act is totally unrelated to any intent they may have had regarding section 10.

[6] The legislative history of the Buck Act, which should be read in *pari materia* with the Hayden-Cartwright Act supports the conclusion that Indian reservations were not meant to be included. *See, e.g.*, the letter from the acting Secretary of the Interior, E.K. Burlew, *infra*, at sec. II.B.2.b. of this Brief, which notes that the Buck Act was not meant to apply to transactions occurring within Indian reservations.

history thus supports the conclusion that Indian reservations are not included in the Act.

B. Assuming *Arguendo* That The Hayden-Cartwright Act Applies To Indian Reservations, It Does Not Abrogate Indian Immunity From Taxation

1. The reference in the Act to "licensed traders" does not manifest unmistakably clear intent to abrogate Indian immunity

First, the term "licensed traders" on its own does not satisfy the "unmistakably clear" rule. The mere reference to licensed traders does not manifest unmistakably clear congressional intent to abrogate Indian immunity from State taxation on Indian reservations. Furthermore, employing canons of construction applicable to Indian situations, leads to the conclusion that the term licensed trader should be limited so as not to include transactions involving Indians. The reference to "licensed traders," interpreted according to applicable canons of construction would at most, have codified existing law allowing taxation where non-Indian traders sell fuel to non-Indian consumers.[7] *See In the Matter of the State Motor Fuel Tax Liability of A.G.E. Corp.*, 273 N.W.2d 737 (S.Ct. S.D. 1978) (finding that the Hayden-Cartwright Act granted states "limited jurisdiction" to tax a non-Indian corporation engaged in highway construction on an Indian reservation). There is no indication that abrogation of Indian tax immunity was intended.

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[7] At the time the Hayden-Cartwright Act was enacted, state taxation over non-Indians on Indian reservations was allowed to the extent that the state taxation did not infringe on tribal sovereignty. *See* Utah & N.Ry. Co. v. Fisher, 116 U.S. 28 (1885); Thomas v. Gay, 169 U.S. 264 (1898). Thus, the licensed trader language at most codified existing law in this regard.

2. The legislative history of the Buck Act indicates that the Hayden-Cartwright Act was not meant to abrogate Indian immunity from taxation

a. Legislative history from the Buck Act should be applied to the Hayden-Cartwright Act

In the United States Code, the Hayden-Cartwright Act, 4 U.S.C. § 104, is followed by the Buck Act, 4 U.S.C. §§ 105-113. The Buck Act empowers states to impose sales tax and income tax on purchases made or incomes earned on federal installations. When introduced, the Buck Act was treated by Congress as the companion to the Hayden-Cartwright Act, which was limited to gasoline taxes. The Buck Act was viewed by Congress as an extension of that Act, expanding the principle to allow state sales and income taxes as well as gas taxes. This is made clear by the introductory remarks of the Committee chairman at the Senate hearings on the Buck Act. "[The original Buck Act bill is only an extension of the principles involved in that Act (Hayden-Cartwright)]." *Application of State Sales and Use Taxes to Transactions in Federal Areas: Hearings on H.R. 6687 Before the Subcomm. of the Comm. on Finance*, 76th Cong., 3rd Sess. 4 (1940) (hereinafter, "*Buck Act Hearings*") The original language of the Buck Act – the bill language that was before the Senate and House Committees when the legislative history was developed – was one paragraph that was almost identical to the language of the Hayden-Cartwright Act.[8] The additional

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[8] House Bill 6687 was introduced to:

authorize the levy of State, Territory, and District of Columbia taxes upon, with respect to, or measured by sales, purchases, or use of tangible personal property or upon sellers, purchasers, or users thereof occurring in United States national parks, military and other

sections now found in the Buck Act were not added until after the hearings. *See* 4 U.S.C. §§ 106-113.

Because the language of the two Acts was so similar, the extensive legislative history on the original Buck Act language serves effectively as the legislative history for the Hayden-Cartwright Act. Also, because Congress said it was applying the same principles to both Acts, the principles underlying the Buck Act provide insight on Congress' intent in regard to the Hayden-Cartwright Act.

While ordinarily, the legislative history of a subsequent law is not considered to be relevant to an interpretation of a prior law, in *Bryan v. Itasca County* this Court pointed out that there are exceptions to this principle, particularly in matters involving the tax immunity of Indians and particularly when, as here, the two laws are intimately related. 426 U.S. at 386. In such cases, it is appropriate to read the statutes *in pari materia* and to consider ambiguities in light of intervening legislative enactments. *See also Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968).

b. The Indian exemption found in the Buck Act should be applied to the Hayden-Cartwright Act

There is an explicit provision in the Buck Act exempting Indians from its scope. Section 5 of the Buck Act provided:

> Nothing in sections 1 and 2 of this Act shall be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed.

54 Stat. 1059 (1940).

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reservations . . .

86 Cong. Rec. 200 (1940).

Evidence shows that Congress considered the original Buck Act language, which was virtually identical to the Hayden-Cartwright Act language, not to empower states to tax Indians and that the Indian exemption provision was added simply as a precaution. The acting Secretary of the Interior, E.K. Burlew, submitted a letter which evidenced the Department of Interior's concern that:

> We have been advised by the office of the Senate legislative counsel that it is not intended to apply to . . . transactions [within Indian reservations]. It is possible, however, that the bill, if enacted, may be construed otherwise by State taxing authorities and by State courts. If the bill were construed to apply to Indian reservations, it would probably be in violation of established constitutional and treaty rights of the Indians . . . . It certainly would be in contravention of the established departmental policy that transactions between Indians on Indian reservations should remain a matter of Federal rather than of State control.

Buck Act Hearings, supra, at 39. The Indian exemption provision was added in response to this testimony.

Clearly it would have been preferable if Congress had explictly applied the Indian exemption provision to the Hayden-Cartwright Act so as to eliminate any possibility of a state misinterpreting that Act. However, by reading the statutes *in pari materia,* as is appropriate here, any ambiguity regarding the Hayden-Cartwright Act's applicability to Indians can properly be resolved by applying the Buck Act exemption – particularly as there is no indication that Congress intentionally excluded the Hayden-Cartwright Act from the Indian exemption provision.[9]

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[9] Further indications that the Hayden-Cartwright Act should be read *in pari materia* with the Buck Act can be found in

3. The circumstances motivating Congress to authorize state taxing jurisdiction within certain federal reservations are completely inconsistent with a conclusion that Congress intended to empower states to tax Indians

A statute is to be construed in light of the circumstances existing at the time it was passed and in view of the evil sought to be corrected and prevented. *United States v. Champlin Refining Co.*, 341 U.S. 290, 297 (1950). The Buck Act legislative history clearly describes the circumstances that prompted Congress to enact the Buck Act. As indicated earlier, Congress specifically stated that these were the same circumstances that underlay the passage of the Hayden-Cartwright Act. A review of the legislative history shows that Congress intended to correct an existing situation by returning to states jurisdiction which they had relinquished to the federal government.

During a hearing on the House bill, the statement was made that:

> the states have been very generous in granting jurisdiction to the Federal government in areas they have ceded to the Government, and it

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the legislative history of the Buck Act. The Senate report stated that:

> the committee amendment amends . . . the Hayden-Cartwright Act *so that the authority granted to the states by such section [the Hayden-Cartwright Act] will more nearly conform to the authority granted to them under section 1* [of the Buck Act].

S.Rep. No. 1625, 76th Cong., 3rd Sess. 5 (1940) (emphasis added). Since the Hayden-Cartwright Act was meant to conform to section 1 of the Buck Act, it follows that the provision in the Buck Act exempting Indians from section 1's provisions should extend to the Hayden-Cartwright Act as well.

> seems . . . that the Federal Government ought not to put itself in the position where . . . it puts the citizens in a given state at a disadvantage as far as tax collections and payments are concerned.

Buck Act Hearings, supra, at 5.

This language clearly shows that Congress was just returning to the states that portion of jurisdiction necessary to cure the undesirable situation that had arisen as a result of their having ceded it. But since the states had no jurisdiction over Indians on Indian reservations to cede to the federal government, there was no jurisdiction to be returned to the states by the Hayden-Cartwright Act.[10]

Also, at the time the Buck Act was proposed, circumstances were such that Indians were not operating retail establishments. Thus, they could not have been contemplated as contributing to the problem Congress was addressing. A Representative from New Mexico testified that with respect to sales on Indian reservations, "the Indian does not run the store. The proprietors of the stores are whites, and not Indians. I do not recall a single

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[10] The source of federal jurisdiction over Indian reservations differs from the source of jurisdiction over other types of federal reservations. The federal government enjoys jurisdiction, indeed exclusive jurisdiction, over certain federal reservations because the states ceded their jurisdiction over those areas. *See* Evans v. Cornman, 398 U.S. 419, 420 (1970) (Under art. I, § 8, cl. 17 of the United States Constitution, the federal government exercises exclusive jurisdiction where a state cedes to the government such jurisdiction). Federal jurisdiction over Indian reservations did not result from cession of state territorial jurisdiction, however, but derives from the Constitution, art. I, § 8, cl. 3 under Congress' power to regulate commerce with the Indian tribes. Buck Act Hearings, *supra,* at 38 (statement of David Speck, Assistant Solicitor, Department of the Interior). *See also,* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832); Montana v. Blackfeet, 471 U.S. 759 (1985).

store being run by an Indian. . . . " *Buck Act Hearings*, *supra*, at 19. As the Representative clarified, however, even if Indians were the proprietors, he advocated that they remain exempt from state taxation. He stated: "we have no desire to tax the Indians. They are exempt from taxation in our state. . . . " *Id.*

Thus, the evil at which the Hayden-Cartwright Act was aimed was not present on Indian reservations as on governmental reservations. Because Congress contemplated the return of jurisdiction to the States and not the granting of new jurisdiction, the Hayden-Cartwright Act was not meant to grant states any new authority on Indian reservations and certainly did not intend to abrogate Indian tax immunity.

III. ASSUMING THAT CONGRESS DID NOT AUTHORIZE THE STATE TAXATION AT ISSUE HERE IN THE HAYDEN-CARTWRIGHT ACT, PRINCIPLES OF FEDERAL INDIAN PREEMPTION AND TRIBAL SOVEREIGNTY PRECLUDE THE STATE FROM IMPOSING TAXES ON SALES OF MOTOR FUEL BY THE TRIBE WITHIN INDIAN COUNTRY

A. There Is A *Per Se* Rule Against State Jurisdiction To Tax Indians Within Indian Country Absent Explicit Congressional Authorization

This Court has made clear that, absent explicit congressional authorization, states have no jurisdiction to tax tribes or tribal members in Indian country:

> [I]n the special area of state taxation, absent cession of jurisdiction or other federal statutes, permitting it, there has been no satisfactory authority for taxing Indian reservation lands or Indian income from activities carried on within the boundaries of the reservation, and McClanahan v. Arizona State Tax Comm'n . . . lays to rest any doubt in this respect by

> holding that such taxation is not permissible absent congressional consent.

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

In *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1985), the Court explained that this prohibition against state taxation of Indians amounted to a *per se* rule. *See also County of Yakima v. Yakima Nation*, 502 U.S. 251, 267 (1992) (reaffirming the *per se* rule against state taxation of Indians absent congressional authorization). This *per se* rule stems from the "deeply rooted" doctrine in federal Indian law that land set aside for Indians is territory over which Indian tribes are self-governing and from which state jurisdiction is generally excluded. *See generally McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 168-71 (1973). Indian immunity from state jurisdiction is based on the separate sovereign status of Indian tribes and the ensuing federal-tribal relationship manifested in treaties and other federal law and policy. *Id.* at 168-69.

Here, the State imposes several taxes on gasoline and diesel fuel. *See Chickasaw Nation v. State ex rel. Oklahoma Tax Comm'n*, 31 F.3d. 964, 971 (10th Cir. 1994). State law requires the wholesale distributors to include the motor fuel taxes in the wholesale price and to collect them from the retailer at the time of the wholesale purchase. Okla. Stat. Ann. tit. 68, §§ 502, 502.1, 502.2, 502.3, 502.4, 502.5, 502.6, 502.7, 516, 520, 522 & 522.1 (1992). The Court of Appeals correctly determined that the legal incidence of this motor fuel tax thus falls directly on the retailer, which in this case, is the Tribe.[11] *Chickasaw Nation*, 31 F.3d at 972. Because the tax's legal incidence so falls, the State is directly taxing the Tribe for activities taking place on

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[11] This brief supports affirmance of the Court of Appeal's holding that the incidence of the State's fuel tax falls on the Tribe. However, we reserve extended argument on that point to the Tribe.

tribal trust land. This taxation is forbidden under this Court's *per se* rule. As there is no congressional authorization here, *see* this brief at section II, *supra*, the motor fuel tax should be struck down.

The State suggests that the motor fuel tax is valid even though the tax may fall directly on the Tribe.[12] First, the State argues that even if the legal incidence of the tax falls on the Tribe, applying a conclusive presumption against such taxation would be to follow mere "formalism". *See* Pet. Br. at 14. It instead argues that since the State's interests in imposing the taxes outweigh the Tribe's interests in being free from them, the taxes should be allowed. But, this Court has explicitly stated its desire not to rebalance issues in cases of this kind:

> [T]he federal tradition of Indian immunity from state taxation is very strong and that the state interest is correspondingly weak. Accordingly it is unnecessary to rebalance these issues in every case.

California v. Cabazon Band of Mission Indians, 480 U.S. 202, 215 n.17 (1985). The State's request that this Court deviate from its established rule to determine the validity of the motor fuel tax as applied to the Tribe should be rejected.[13]

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[12] The State concedes that where the Tribe purchases fuel for use in tribally owned vehicles for tribal purposes, state law exempts those purchases from tax. Chickasaw Nation, 31 F.3d at 971. This concession alone does not bring the state taxing scheme into compliance with the *per se* rule, however.

[13] All the cases cited by the State as support for its balancing approach either address situations involving state regulations other than taxation or state taxation of non-Indians. As such, none are on point.

B. The Same *Per Se* Rule Precludes The State From Taxing Sales Of Fuel By The Tribe To Tribal Members

Even if this Court finds that the fuel taxes constitute taxes on the consumer rather than on the retailer, the fuel taxes are invalid at least as applied to sales to tribal members under the *per se* rule. The rule applies with equal force to invalidate state taxation of individual Indians as well as tribes within Indian country. *See, e.g., McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991).

Thus, if the legal incidence of the fuel tax is found to fall on the ultimate consumer, where those consumers are tribal members purchasing fuel in Indian country, the State may not tax them absent explicit authorization by Congress. Since no such authorization exists here, the State tax as applied to tribal members is *per se* invalid.[14]

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[14] The State contends that the "extra-reservation" effects of vehicular use warrant its taxation of sales of motor fuel in Indian country even to tribal members. *See* Pet. Br. at 32. In support of its argument, the State relies on three cases: Rice v. Rehner, 463 U.S. 713 (1983); Oklahoma Tax Comm'n v. Sac and Fox Nation, 113 S.Ct. 1985 (1993); and Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980). However, external effects of the sort suggested by the State have never validated a tax on Indian activities or land within Indian country, and the cited cases lend little support to its argument.

The first case, Rice did not concern taxation of Indians, but rather, regulation of liquor. Significantly, Rice noted that there had been a historical tradition of state regulation of Indians in Indian country "in the narrow context of the regulation of liquor." Rice, 463 U.S. at 723. This Court specifically found that the "spillover" effects *regarding alcohol regulation* "[are]

C. The State Is Precluded From Taxing Sales Of Fuel By The Tribe To Non-Members In Indian Country Because Imposition Of The State Motor Fuel Tax Infringes On The Tribe's Right To Self-Government

States lack jurisdiction to tax activities of non-members within Indian country where such taxation infringes on tribal self-government or is preempted by federal law and policy. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980).

The test for finding infringement is whether the state law interferes with the right of Indians "to make their own laws and be ruled by them." *Williams v. Lee*, 358 U.S. 217, 220 (1959). This test seeks an accommodation between a state's and a tribe's interests by allowing the state to protect its interests "up to the point where tribal self-government would be affected." *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 179 (1973).

In *Colville*, the Court suggested that infringement could be found if the state tax interfered with the tribe's right to exercise its regulatory functions. *Id.* at 158. Here, the State's taxation of the Tribes' fuel sales to non-members interferes with the Tribe's ability to regulate within Indian country.[15]

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qualitatively different from any "spillover" effects of income taxes or taxes on cigarettes." *Id.* at 724.

In neither Sac and Fox nor Colville did the Court reach the question whether a state could permissibly tailor a fuel tax to account for vehicle use outside of Indian country. Even assuming *arguendo* that a state could so narrowly tailor its taxes, the record in this case presents no evidence thereof. Save the exemption for tribal use, the State here taxes one hundred percent of motor fuel use by tribal members within or without Indian country.

[15] Should this Court find that the record is not sufficient to show this interference, it should remand for further development on this point. *See, e.g.*, Oklahoma Tax Commission v. Sac and Fox Nation, 113 S.Ct. 1985 (1993).

> The decision to enact certain taxes and not to enact others, and the decision to vary rates and exemptions are highly sophisticated tools which can be used to encourage particular kinds of business activity and property-holding and to discourage other such activity. Tax incentives for the location and operation of industry might be a decision which the state is willing to make in a situation where an Indian tribe might choose to foster collective agricultural economic activity or small cottage industry instead. The taxing decisions made or left unmade by the governmental entity significantly affect the culture, economic development, and collective goals of the people.

Dan Israel and Thomas Smithson, *Indian Taxation, Tribal Sovereignty and Economic Development*, 49 N.D.L.Rev. 268, 282 (1973).

As the State taxation here would necessarily interfere with the Tribe's right to make decisions regarding taxation within Indian country – and thus its right and practical ability to regulate its own internal economic and social development – the tax should be struck down as infringing on tribal sovereignty.[16]

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[16] A state imposed motor fuel tax would also infringe on tribal sovereignty in a situation where the value of the fuel is generated within Indian country, such as where a tribe produces its own fuel. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). Also, it would infringe where fuel sales are part of a larger economic development project, such as where fuel is sold in connection with a tribally run casino or other tribally run business. In such a case, the tribe would not be merely marketing a tax exemption – such exemption would be merely incidental to the larger economic development project. *Id.*

IV. THE STATE IS BARRED FROM TAXING INCOME EARNED BY TRIBAL MEMBERS FOR WORK DONE FOR THE TRIBE WITHIN INDIAN COUNTRY

A. *McClanahan v. Arizona Tax Commission* Bars State Taxation Of Income Earned Within Indian Country By A Tribally Employed Member Residing Outside Of Indian Country

In *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973), this Court struck down a state tax on the income of a Navajo Indian residing on the Navajo Reservation and earning all of her income within the Reservation boundaries. The Court held that, "[s]ince appellant is an Indian and since her income is derived wholly from reservation sources, her activity is totally within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves." 411 U.S. at 179, 180. Here, the Indians' income at issue is earned within Indian country, but unlike *McClanahan*, the Indians do not reside within Indian country. However, unlike *McClanahan*, the tribal members are employed by the Tribe.

McClanahan made clear that the rule against state taxation applies only to a tribe that has retained its autonomy and to Indians who have not become assimilated. The Court noted that " . . . the doctrine [of tribal sovereignty] has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community." 411 U.S. at 171.[17]

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[17] The question of assimilation has been important in other contexts as well. In Morton v. Ruiz, the question was:

> whether Congress intended to exclude from the general assistance program these respondents and their class, who are full-blooded, unassimilated Indians living in an Indian community near their native reser-

In *McClanahan*, the evidence that the Indians were not assimilated came from the fact that they resided on the reservation. Here, enrolled tribal members live near Indian country and commute daily to Indian country to work for their tribe.[18] These factors provide the same assurance that they have not been assimilated into the general community as did residence on the reservation in *McClanahan*. *Cf. Morton v. Ruiz*, 415 U.S. 199 (1974). Also, here the members work directly for the tribal government, a factor not present in *McClanahan*.[19] The doctrine of Indian sovereignty should apply with full force here to preclude state taxation on income earned by tribal members living near Indian country and carrying out the sovereign functions of the Tribe within Indian country.[20]

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vation, and who maintain close economic ties with that reservation.

415 U.S. 199, 211 (1974).

This Court concluded from testimony given to Congress that Congress was led to believe that the programs were being made available to those unassimilated needy Indians living near the reservation as well as to those living 'on.'

Id. at 229.

[18] This case is distinguishable from Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) where this Court upheld a state's gross receipts tax on receipts earned by a tribe's ski area operated off the reservation. The income generating activity here occurs within Indian country.

[19] This is not to suggest that McClanahan would not apply where tribal members commuted to non governmental jobs within Indian country. That issue is not before the Court.

[20] Whether or not in the context of dual state taxation states have jurisdiction to tax the income of residents wherever earned, this Court has counseled in White Mountain Apache Tribe v. Bracker against importing notions from the state context into the Indian context:

As noted previously, in the years since *McClanahan* was decided, the Court solidified a *per se* rule against state taxation of Indian activities within Indian country. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). Hence, the Court need not even examine the Tribe's treaty here to see if it expressly forbids state taxation. Assuming *arguendo*, however, that the specific treaty at issue here is relevant, state jurisdiction is nevertheless foreclosed. As the Court of Appeals found, the Tribe's treaty is clear on this point. *Chickasaw Nation*, 31 F.3d. at 978.

B. Even Assuming *Arguendo* That *McClanahan* Does Not Control Here, Imposition Of The Taxes At Issue Is Foreclosed Because It Interferes With The Tribe's Right Of Self Government

In *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 113 S.Ct. 1985 (1993), the Court faced the question presented

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> Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of pre-emption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been preempted by operation of federal law. . . .

448 U.S. 136, 143 (1980) (citation omitted).

Also, the Court has generally rejected state taxation which imposes an additional burden on a tribal enterprise where it is not "justified by functions or services performed by the State in connection with the on-reservation activity." New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 336 (1983) (citing Ramah Navajo School Bd. v. Bureau of Revenue, 458 U.S. 832, 843 and n.7 (1982)). There is nothing in the record here to indicate that the State performs any services in connection with the functioning of the tribal government.

here, but remanded to the lower courts without resolving the issue. In remanding, the Court expressly left open the question of:

> whether the Tribe's right to self-governance could operate independently of its territorial jurisdiction to pre-empt the State's ability to tax income earned from work performed for the Tribe itself when the employee does not reside in Indian country.

113 S.Ct. 1985, 1992.

Here, the burden of state income taxes will directly affect the ability of the Tribe to pay compensation to employees to carry out the government's programs and to attract and keep the most qualified tribal employees as their income will be substantially impacted by the tax paid to the State. The State should not be allowed to tax the operation of the Tribe's government.[21] To do so directly infringes on tribal sovereignty.[22] It also infringes on the rights of the individual members as *McClanahan*, citing *Williams v. Lee* makes clear. "[A]ppellants rights as a reservation Indian were violated when the state collected a tax from her which it had no jurisdiction to impose." 411 U.S. at 181.

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[21] That federal employees pay state income taxes does not affect the inquiry here. As this Court made clear in Ramah Navajo School Board, Inc. v. Bureau of Revenue, different rules apply in the tribal context than apply in the federal context. 458 U.S. 832 (1982). In Ramah, the dissent noted that the same tax allowed on federal projects was disallowed in the tribal context. *Id.* at 856. (Rehnquist, J., dissenting) (citing United States v. New Mexico, 455 U.S. 720, 735 (1982).

[22] Should this Court find that the record is not sufficient to show this interference, it should remand for further development on this point. See note 17, *supra*.

CONCLUSION

For the reasons stated above, the holdings of the Court of Appeals should be affirmed.

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